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1

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE
STATE OF NEW YORK, The People of the
State of New York, Edward S. Walsh,
Superintendent of Public Works of the
State of New York and Edward S.
Walsh, Individually and Personally for
a Writ of Prohibition and/or a Writ of
Mandamus Against the Honorable John
R. Hazel, Judge of the District Court of
the United States for the Western Dis-
trict of New York, and the Officers of
Said Court.

2

No. —,
Original.

3

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT
OF PROHIBITION AND/OR A WRIT OF MANDAMUS.**

4

And now comes Charles D. Newton, Attorney-Gen-
eral of New York State, on behalf of the State of
New York, The People of the State of New York,
Edward S. Walsh, Superintendent of Public Works
of the State of New York, and Edward S. Walsh, indi-
vidually and personally and respectfully moves this
honorable court:

5

1. For leave to file the petition for a writ of pro-
hibition and/or a writ of mandamus, hereto annexed,
and

2. That a rule be entered and issued directing the
District Court of the United States for the Western

Motion

6

District of New York and Honorable John R. Hazel, the judge thereof, and the officers of said Court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the Petitioners should not have such other and further relief therein, as may be just.

7

Oct. 15, 1920.

CHARLES D. NEWTON,

George S. Walsh
 Attorney General of New York,
 And Attorney for the State of New York, The People of the State of New York, Edward S. Walsh, Superintendent of Public Works, of the State of New York, and Edward S. Walsh, individually and personally.

8

9

10

No. —, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE STATE OF
 NEW YORK, The People of the State of New York,
 Edward S. Walsh, Superintendent of Public Works
 of the State of New York and Edward S. Walsh,
 Individually and Personally for a Writ of Pro-
 hibition and/or a Writ of Mandamus Against 13
 Honorable John R. Hazel, Judge of the District
 Court of the United States for the Western Dis-
 trict of New York, and the Officers of Said Court.

**PETITION FOR A WRIT OF PROHIBITION AND /OR A 14
 WRIT OF MANDAMUS.**

*To the Honorable the Chief Justice and the Associate
 Justices of the Supreme Court of the United
 States:*

The petition of Charles D. Newton, Attorney Gen-
 eral of New York State, on behalf of the State of
 New York, the People of the State of New York, 15
 Edward S. Walsh, Superintendent of Public Works
 of the State of New York and Edward S. Walsh, indi-
 vidually and personally, against Hon. John R. Hazel,
 the Judge of the District Court of the United States
 for the Western District of New York, sitting in

Petition

16

admiralty, and the officers of said court, respectfully shows to this honorable court as follows:

17

1. That a libel was duly filed in the District Court of the United States for the Western District of New York, by the Murray Transportation Company, bailee of the United States Navy *Coal Barge No. 483*, against the steam tug "*Henry Koerber, Jr.*," her boilers, etc., on April 15, 1920; that a libel was likewise filed by William J. Dolloff in the same court against the steam tug "*Charlotte*," her engines, etc., on Feb. 5, 1920; that a libel was likewise filed by George Wagner in the same court against the steam tug "*Charlotte*," her engines, etc., on Feb. 5, 1920, as will more fully appear from certified copies of said libels annexed hereto, made a part hereof and marked respectively "papers" "1," "2" and "3."

18

19

2. That separate answers to said libels were duly interposed and filed in said court by the Proctors for the claimants of said steam tugs "*Henry Koerber, Jr.*," and "*Charlotte*," etc., respondents therein, as will more fully appear from the certified copies of said answers annexed hereto, made a part hereof and marked respectively "papers" "4," "5" and "6."

20

3. That lawful bonds were duly filed by the Proctors of said claimants of said steam tugs, respondents therein, as will more fully appear from certified copies of said bonds annexed hereto, made a part hereof and marked respectively "papers" "7," "8" and "9."

4. That the Claimants-Respondents therein thereupon petitioned said District Court in all three causes, under the 59th rule in Admiralty, for process against Edward S. Walsh, Superintendent of Public Works of the State of New York, as will more fully appear by certified copies of said petitions annexed hereto,

Petition

21

made a part hereof and marked respectively "papers" "10," "11" and "12," upon the ground generally that the injuries set up in the libels took place while the Claimants steam tugs "*Henry Koerber, Jr.*," and "*Charlotte*," respondents therein, were under charters made upon behalf of the People of the State of New York by Edward S. Walsh, Superintendent of Public Works of the State of New York, with the Claimants-Respondents therein. 22

5. Whereupon orders were issued and entered by the said District Court granting the relief prayed for, as will more fully appear by certified copies of said orders annexed hereto, made a part hereof and marked respectively "papers" "13," "14" and "15." 23

6. Following which, monitions were duly issued to said Edward S. Walsh, Superintendent of Public Works of the State of New York, and were served upon him within the Western District of New York, as will more fully appear from certified copies of said monitions annexed hereto, made a part hereof and marked respectively "papers" "16," "17" and "18." 24

7. Whereupon your petitioners herein, appeared in said District Court specially and not otherwise in all three causes for the purpose of questioning the jurisdiction of the Court, and moved the District Court of the United States for the Western District of New York, Hon. John R. Hazel, presiding on September 7, 1920, to dismiss the proceedings as against Edward S. Walsh, Superintendent of Public Works of the State of New York, duly filing a suggestion of want of jurisdiction, and said motion was denied by said District Court as will more fully appear by certified 25

Petition

26

copies of the suggestion of want of jurisdiction, the order and the opinion of the Court annexed hereto, made a part hereof and marked respectively "papers" "19," "20" and "21."

27

8. That the papers annexed hereto, made a part hereof and numbered from "1" to "21" inclusive, and the certified copies of the Docket Entries of the Clerk of the District Court annexed hereto, made a part hereof and marked respectively "papers" "22," "23" and "24," constitute the whole of the record proper and no more, of the District Court in all three causes.

28

9. That the District Court of the United States for the Western District of New York was, and is without jurisdiction of the person of Edward S. Walsh, Superintendent of Public Works of the State of New York, upon the ground that the orders and monitions made against and served upon Edward S. Walsh, Superintendent of Public Works of the State of New York, as above recited constitute suits, cases, causes and controversies against the State of New York in which the

29

State of New York has not now and never has consented to be sued, as will more fully appear by the memorandum filed herewith.

Wherefore the said Charles D. Newton, Attorney General of the State of New York, the aid of this honorable Court respectfully requesting, prays:

30

1. That a writ of prohibition may issue out of this honorable Court to the said Hon. John R. Hazel, Judge of the District Court of the United States for the Western District of New York, and /or the officers of said Court, prohibiting them from taking any steps whatsoever in all three causes aforesaid and each of them, against the State of New York, the People of

Petition

the State of New York, Edward S. Walsh, Superin- 31
 tendent of Public Works of the State of New York,
 and Edward S. Walsh, individually and personally,
 and, generally from the further exercise of jurisdic-
 tion in said causes and the enforcing of any order,
 judgment and decree made under the color thereof
 against the State of New York, the People of the State
 of New York, Edward S. Walsh, Superintendent of 32
 Public Works of the State of New York, and Edward
 S. Walsh, individually and personally.

2. That a writ of mandamus be issued out of and
 from this honorable Court directing and command-
 ing the Hon. John R. Hazel, Judge of the District
 Court of the United States for the Western District
 of New York, to vacate the whole of the orders made 33
 by him directing that process issue against Edward
 S. Walsh, Superintendent of Public Works of the State
 of New York, and directing him to withdraw and
 vacate the monitions issued against said Edward S.
 Walsh, Superintendent of Public Works of the
 State of New York, and directing him to
 vacate the order denying your petitioner's motion to 34
 dismiss the proceedings in all three cases against
 Edward S. Walsh, Superintendent of Public Works
 of the State of New York, and further directing him
 to enter an order vacating and dismissing the pro-
 ceedings in all three causes and each of them against
 Edward S. Walsh, Superintendent of Public Works of
 the State of New York, and directing Harris S. Wil- 35
 liams, Clerk of the United States District Court for
 the Western District of New York to return to Edward
 S. Walsh, Superintendent of Public Works of the
 State of New York, all costs paid by him to said Clerk
 in these proceedings.

36

Petition

3. That the Court grant your petitioners such other and further relief as may be just in the premises.

CHARLES D. NEWTON,
Attorney General of New York,

George C. King
Upon Behalf of the State of New York, The People of the State of New York, Edward S. Walsh, Superintendent of Public Works of the State of New York, and Edward S. Walsh, individually and personally.

37

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

38

CHARLES D. NEWTON.

Subscribed and sworn to before me,
this 25th day of October, 1920.

[SEAL]

WILLIAM M. THOMAS,
Notary Public.

39

40

" PAPER 1 "

TO THE HONORABLE THE JUDGES OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK:

The Libel and Complaint of
MURRAY TRANSPORTATION COM-
PANY, Bailee of UNITED STATES
NAVY COAL BARGE No. 483,

42

against

The Steamtug " HENRY KOERBER,
JR.," her Boilers, Engines,
Tackle, Apparel and Furniture
in a cause of Collision, Civil and
Maritime, Alleges upon In-
formation and Belief:

43

FIRST: That your libelant now is and at all of the
times herein mentioned was a domestic corporation
organized and existing under and by virtue of the laws
of the State of New York, and at all said times was
the bailee of the United States Navy Coal Barge
No. 483.

44

SECOND: That the said steamtug " Henry Koerber,
Jr.," now is or during the currency of process herein
will be within the jurisdiction of the United States
and of this Honorable Court.

45

THIRD: That heretofore and during the month of
October, 1919, the steamtug " Henry Koerber, Jr.,"
together with another tug, undertook to tow four
barges, among which was the No. 483, from Tona-
wanda, N. Y. to Waterford, N. Y. The various locks
along the canal accommodated only two of the barges,
made up close together, and a tug, and in order to lock

- 46 through, the tow would be broken up and each tug would take two barges. After the four barges would be locked through, as described, the tow, if the intervening level was long, would be rearranged and proceed together to the next lock. Following this custom the tow, at lock 6, was broken up and the tug "Henry Koerber, Jr.," proceeded with two of the barges, one
- 47 of them being the No. 483. The canal from lock 6 to lock 2, which locks are in close proximity to one another, runs practically east and west. At the time the tug "Henry Koerber, Jr.," set out with her tow to pass through lock 6 the wind was from the south. The "Henry Koerber, Jr.," with her two barges, proceeded without trouble through locks 6, 5 and 4. After
- 48 passing out of lock 4, and while proceeding to lock 3, the said tug brought her tow into collision with the side of the canal causing the bow of the forward boat, to wit, the No. 483, to strike against the south bank or shore of the canal, causing severe damage to the "No. 483." The side of the canal at this place consists of concrete pillars with short intervening spaces between.
- 49 **FOURTH:** That said damage was caused without any fault, neglect or want of care on the part of the said libellant or those in charge thereof, but was caused solely through the fault, neglect and want of care on said steamtug and those in charge thereof, in the following, among other particulars which will be pointed out on the trial of this action:
- 50
1. In that the man in charge of the tug was incompetent and inattentive.
 2. In that the man in charge of the tug was not a licensed pilot or master.
 3. In that the man in charge of the tug was making his maiden trip as a pilot.
 4. In that the said "Henry Koerber, Jr." having no motor power was brought into collision with the bank or shore of the canal.

5. In that the said "Henry Koerber, Jr." was caused to collide with the bank of the canal.

6. In that said tug and those in charge did not take into proper consideration the conditions prevailing at the time.

FIFTH: That by reason of the premises libelant has been damaged in the cost of necessary repairs to said vessel, loss of the use of said vessel in a profitable employment while undergoing repairs, loss of equipment, utensils, supplies and master's effects, towage, surveyor's and other charges, amounting in all to the sum of approximately three thousand dollars, no part of which has been paid, although payment thereof has been duly demanded. 52

SIXTH: That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. 53

WHEREFORE, libelant prays that process in due form of law may issue against the said vessel, its boilers, engines, tackle, apparel, equipment and furniture, and against any and all persons having or claiming to have any interest therein, citing them to appear and answer the matters aforesaid, and that libelant may have judgment for the amount of its claim aforesaid, together with interest and costs, and that said vessel, its boilers, engines, tackle, apparel, equipment and furniture, may be condemned and sold to pay the same, and that libelant may have such other and further relief as the court may seem just. 54 55

FOLEY & MARTIN,

Proctors for Libelant,

Office and P. O. Address,

No. 64 Wall Street,

Borough of Manhattan,

New York City.

56

Paper 1

STATE OF NEW YORK, } ss.:
 COUNTY OF NEW YORK, }

57

WILLIAM J. McCOURT, being duly sworn, deposes and says: That he is the vice president of Murray Transportation Company, a corporation, the libellant herein; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

58

That the reason this verification is made by deponent is that libellant is a corporation, and deponent an officer thereof, to wit, its

That the sources of deponent's information and the grounds of his belief as to all matters not stated in the libel to be alleged upon his own knowledge, are reports made to him by employees, together with records of said corporation.

WILLIAM J. McCOURT.

59

Sworn to before me, this 10th
 day of April, 1920.

JENNIE A. TORVAN,

[SEAL]

Notary Public.

New York County No. 137.

New York Register No. 1117.

60

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK. }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Libel, with the Original entered and on file in this office, and that the same is a correct

Page 2

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transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A. D. 1920. 62

HARRIS S. WILLIAMS,
Clerk.

" PAPER 2 "

UNITED STATES DISTRICT COURT — WEST- 63
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY.

WILLIAM J. DOLLOFF,

against

Steam Tug " CHARLOTTE," Her Engines,
Boiler, Machinery, Boats, Tackle,
Apparel and Furniture. 64

THE HONORABLE JOHN R. HAZEL, U. S.
DISTRICT JUDGE FOR THE WESTERN
DISTRICT OF NEW YORK.

The libel of William J. Dolloff, against the steam tug Charlotte, her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of collision, civil and maritime, respectfully shows to this Court as follows: 65

I. That libellant is now, and at all the time and times hereinafter mentioned was a resident of the

Paper 2

66 City of New York, State of New York, and is the sole, true and lawful owner of the canal boats " Joseph Weed and Romaine, which are, and at the times hereinafter mentioned were engaged in commerce and navigation upon the waters of the Erie Canal, the Hudson River and the waters adjacent and tributary thereto.

67 II. Upon information and belief that at all the time and times hereinafter mentioned the steam tug Charlotte was and is a vessel of the United States of twenty tons burden and upwards, engaged in towing in the Erie Canal, and Lake Erie and waters adjacent and tributary thereto.

68 III. That on or about the 6th day of July, 1919, the said steam tug Charlotte took the said canalboats Joseph Weed and Romaine in tow, with the understanding and agreement that they be towed in company with the canalboat John Monk, the George Pilbeam and the Reba Mildred from Waterford, in the State of New York, in and along the said Erie Canal, the Joseph Weed and Romaine being bound for
69 Rochester in the same State; that after leaving the Waterford locks the Charlotte was towing with two hawsers, the Pilbeam being lashed alongside the Weed, and these boats constituted the hawser tier of the tow, one end of one hawser being made fast on the Pilbeam, and the other end made fast on the tug; and one end of the other hawser being made fast on the tug, and the other end on the Weed; that the next
70 tier of canalboats in the tow consisted of the John Monk and the Reba Mildred, the Monk being behind the Weed on the starboard side, and the Reba Mildred being behind the Pilbeam, the Monk and Reba Mildred being lashed together; that behind the John Monk was the canalboat Romaine; that in addition

to the vessels being lashed side by side as aforesaid, the Joseph Weed, the John Monk and the Romaine were lashed end to end constituting a so-called "triple header", and the George Pilbeam and the Reba Mildred were likewise lashed end to end making a so-called "double header".

IV. Upon information and belief that at the time when said tow was made up, and at all the time and times hereinafter mentioned, up to, and at the time of the disaster hereinafter set forth, that said canalboats Joseph Weed and Romaine were tight, staunch and strong, well apparelled and tackled, and the said canalboats constituting said tow had the usual and proper complement of men stationed and attentive to their duties; that all went well on said voyage until the said tow was approaching Indian Castle stop gate, about three o'clock in the afternoon of the 7th day of July, 1919, the weather being clear, with a light wind blowing from port to starboard and about abeam on the canalboats; that the tow at this time was proceeding at the rate of about four miles an hour and was approaching the Indian Castle stop gate, and on account of the wind, and the fact that the tug was not holding sufficiently to the port side of the canal, the canal boats, all of which were without cargo, were drifting off toward the starboard shore of the canal, and when the tow was some little distance from the concrete projection of the stop gate on the starboard side of the canal, it was seen that there was danger of the said canalboats coming in collision with said stop gate; that at, and prior to this time the men on the said tow did all in their power both at the wheels and at the tillers of the said canalboats to work them over to the middle of the canal, but notwithstanding

76

all their efforts, and that everything possible was done on said canalboats to avert said pending collision, and the tug was hailed and requested to pull said canalboats over to the said port hand side, she continued ahead and did not slack away on either of the hawsers with which the said canalboats were

77

made fast to the tug, and the Charlotte finally pulled the said canalboat Joseph Weed into the said starboard projection of said stop gate; that the tug continued ahead at the speed at which she had been theretofore traveling, until just about the time of, or a few seconds prior to the collision, and by the force of the collision and the sudden stopping of the canalboats by reason thereof, the canalboat Joseph Weed was badly

78

damaged and opened up, and by the sudden stopping of the tow the Romaine was also damaged and opened up; that by the use of her pumps and a siphon from the Charlotte the Joseph Weed was kept sufficiently clear so that she could continue her voyage to a port of repair; the Romaine was also leaking but was kept

79

clear by her own pumps; and the said canalboats Joseph Weed and Romaine arrived at Durhamville about noon on the 9th day of July, the tug Charlotte having left said tow on the 8th.

80

V. Upon information and belief that said collision and the resultant damage to said canalboats Joseph Weed and Romaine were in no wise caused or occasioned by the negligence of the said canalboats, or either of them, nor of this libelant, nor any of his agents or employees, but was caused solely by the negligence and carelessness of said steam tug Charlotte, her officers and crew; that said libelant is not fully acquainted with all that occurred on said tug Charlotte and saving and reserving unto himself the

right to urge any further or other faults that may appear upon a full hearing of this cause, libelant alleges upon information and belief that the said tug Charlotte, her officers and crew are at fault in the following particulars:

1. In that she was proceeding at too great a speed. 82
2. In that she had no sufficient lookout.
3. In that those in charge of her were careless, negligent and inattentive to their duties.
4. In that when approaching said stop gate she did not reduce her speed.
5. In that she did not steer her course more to the porthand side of the canal, especially under the weather conditions that prevailed at and prior 83 to the time of the disaster.
6. In that she did not have a man stationed on the tug at the timberhead where the hawsers from the canalboats were made fast, in order to slacken away on said hawsers, or one of them if the necessity therefor arose, when approaching said stop gate; and in that the line to the port boat of the hawser tier was not slacked away before the 84 Weed struck the stop gate.
7. In that she pulled said tow into said stop gate.

VI. That in and by said collision and disaster aforesaid, said canalboats Joseph Weed and Romaine were badly damaged and opened up, and that the actual cost and reasonable value of the repairs to said canalboats, necessitated by reason of the disaster, and the incidental expense connected therewith, including pumping bills keeping the Weed afloat until she reached Durhamville, which libelant was compelled to, and did make and pay, was at least the sum of \$1,526.32, of which said sum \$1,477.71 was the cost of 85

Paper 2

- 86 repair and incidental expenses of the Weed, and the balance, the cost of repairs and incidental expenses connected with the damage to the Romaine; that in waiting for dry dock and making the repairs to said canalboat the Weed was detained for a period of thirty days, and the Romaine for a period of four days; and that the reasonable value of the use of the
- 87 said canalboats while thus detained was at least the sum of \$340.00, and the total damage to libelant occasioned by reason of said disaster was the sum of \$1,866.32, which, with interest thereon from the 7th day of July, 1919, is the sum hereby sued for.

VII. Upon information and belief that the steam tug Charlotte is now, or soon will be at the port of

88 Buffalo, or the port of Rochester, within the jurisdiction of this Honorable Court.

VIII. Upon information and belief that all and singular of the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

- WHEREFORE, libelant prays that process in due form
- 89 of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said steam tug "Charlotte," her engines, boilers, machinery, boats, tackle, apparel and furniture, and that all persons having or claiming any interest therein may be cited to appear and answer all and singular the premises, and that
- 90 upon final hearing this Honorable Court will be pleased to decree payment to libelant of its damages aforesaid, with interest from the 7th day of July, 1919, and that the said steam tug "Charlotte," her engines, machinery, boilers, boats, tackle, apparel and furniture may be condemned and sold to pay the same, and for

such other and further relief as libelant may be
entitled to receive.

91

WILLIAM J. DOLLOFF,

Libelant.

BROWN, ELY & RICHARDS,

Proctors for Libelant,

Office & P. O. Address,

1317 Chamber of Commerce,

Buffalo : New York.

92

STATE OF NEW YORK, }

COUNTY OF ERIE, }

City of Buffalo, }

ss.:

WILLIAM J. DOLLOFF, being duly sworn deposes and
says that he is the libelant above named; that he has
read the foregoing libel and knows the contents thereof
and the same is true to the best of his knowledge,
information and belief.

93

WILLIAM J. DOLLOFF.

Subscribed and sworn to before me
this 25th day of September, 1919.

94

F. A. PARKER,

Notary Public in and for

Erie County: New York.

UNITED STATES OF AMERICA, }

WESTERN DISTRICT OF NEW YORK, }

ss.:

I, HARRIS S. WILLIAMS, Clerk of the District Court
of the United States for the Western District of New
York, do hereby certify that I have compared the
annexed copy of Libel, with the Original entered and
on file in this office, and that the same is a correct

95

Paper 3

96 transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of
 97 [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

“ PAPER 3 ”

98 UNITED STATES DISTRICT COURT — WEST-
 ERN DISTRICT OF NEW YORK — IN
 ADMIRALTY.

GEORGE WAGNER

against

99 Steam Tug “ CHARLOTTE,” Her Engines,
 Boilers, Machinery, Boats, Tackle,
 Apparel and Furniture.

THE HONORABLE JOHN R. HAZEL, U. S. DIS-
 TRICT JUDGE FOR THE WESTERN DIS-
 TRICT OF NEW YORK.

100 The libel of George Wagner against the steam tug Charlotte, her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of collision, civil and maritime, respectfully shows to this Court as follows:

I. That libelant is now, and at all the time and times hereinafter mentioned was a resident of the

City of New York, State of New York, and is the sole, true and lawful owner of the canalboat John Monk, which is, and at the times hereafter mentioned was engaged in commerce and navigation upon the waters of the Erie Canal, the Hudson River, and the waters adjacent and tributary thereto.

II. Upon information and belief that at all the time and times hereinafter mentioned the steam tug Charlotte was and is a vessel of the United States of twenty tons burden and upwards, engaged in towing in the Erie Canal, Lake Erie and waters adjacent and tributary thereto. 102

III. That on or about the 6th day of July, 1919, the said steam tug Charlotte took the said canalboat John Monk in tow, with the understanding and agreement that she be towed in company with the canalboats Joseph Weed and the Romaine, the George Pilbeam and the Reba Mildred from Waterford, in the State of New York, in and along the said Erie Canal, the Monk being bound for Rochester in the same State; that after leaving the Waterford locks the Charlotte was towing with two hawsers, the Pilbeam being 103 lashed alongside the Weed, and these boats constituted the hawser tier of the tow, one end of one hawser being made fast on the Pilbeam, and the other end made fast on the tug; and one end of the other hawser being made fast on the tug, and the other end on the Weed; that the next tier of canalboats in the tow consisted of the John Monk and the Reba Mildred, the Monk 104 being behind the Weed on the Starboard side, and the Reba Mildred being behind the Pilbeam, the Monk and Reba Mildred being lashed together; that behind the John Monk was the canalboat Romaine; that in addition to the vessels being lashed side by side as aforesaid, the Joseph Weed, the John Monk and the 105

106 Romaine were lashed end to end constituting a so-called "triple header," and the George Pilbeam and the Reba Mildred were likewise lashed end to end making a so-called "double header."

107 IV. Upon information and belief that at the time when said tow was made up, and at all the time and times hereinafter mentioned, up to, and at the time of the disaster hereinafter set forth, that said canalboat John Monk was tight, staunch and strong, well apparelled and tackled, and the said canalboats constituting said tow had the usual and proper complement of men stationed and attentive to their duties; that all went well on said voyage until the said tow was approaching Indian Castle stop gate, about three
108 o'clock in the afternoon of the 7th day of July, 1919, the weather being clear, with a light wind blowing from port to starboard and about abeam on the canalboats; that the tow at this time was proceeding at the rate of about four miles an hour and was approaching the Indian Castle stop gate, and on account of the wind, and the fact that the tug was not holding sufficiently to the port side of the canal, the canalboats,
109 all of which were without cargo, were drifting off toward the starboard shore of the canal, and when the tow was some little distance from the concrete projection of the stop gate on the starboard side of the canal, it was seen that there was danger of the said canalboats coming in collision with said stop gate;
110 that at, and prior to this time the men on the said tow did all in their power both at the wheels and at the tillers of the said canalboats to work them over to the middle of the canal, but notwithstanding all their efforts, and that everything possible was done on said canalboats to avert said pending collision, and the tug was hailed and requested to pull said canalboats over

to said port hand side, she continued ahead and did not slack away on either of the hawsers with which the said canalboats were made fast to the tug, and the Charlotte finally pulled the said canalboat Joseph Weed into the said starboard projection of said stop gate; that the tug continued ahead at the speed at which she had been theretofore traveling, until just about the time of, or a few seconds prior to the collision, and by the force of the collision and the sudden stopping of the canalboats by reason thereof, the canalboat John Monk was badly damaged and opened up, by being squeezed between the Joseph Weed and the Romaine; that by the use of their pumps the Joseph Weed and the Monk were kept sufficiently clear so that they could continue their voyage to a port of repair, and the said canalboat John Monk arrived at Durhamville about noon on the 9th day of July, the tug Charlotte having left said tow on the 8th. 111 112 113

V. Upon information and belief that said collision and the resultant damage to said canalboat John Monk were in no wise caused or occasioned by the negligence of the said canalboat, nor of this libellant, nor any of his agents or employees, but was caused solely by the negligence and carelessness of said steam tug Charlotte, her officers and crew; that said libellant is not fully acquainted with all that occurred on said tug Charlotte and saving and reserving unto himself the right to urge any further or other faults that may appear upon a full hearing of this cause, libellant alleges upon information and belief that the said tug Charlotte, her officers and crew are at fault in the following particulars: 114 115

1. In that she was proceeding at too great a speed.
2. In that she had no sufficient lookout.

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3. In that those in charge of her were careless, negligent and inattentive to their duties.

4. In that when approaching said stop gate she did not reduce her speed.

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5. In that she did not steer her course more to the port hand side of the canal, especially under the weather conditions that prevailed at and prior to the time of the disaster.

6. In that she did not have a man stationed on the tug at the timberhead where the hawsers from the canalboats were made fast, in order to slacken away on said hawsers, or one of them if the necessity therefor arose, when approaching said stop gate; and in that the line to the port boat of the hawser tier was not slacked away before the Weed struck the stop gate.

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7. In that she pulled said tow into said stop gate.

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VI. That in and by said collision and disaster aforesaid, said canalboat John Monk was badly damaged and opened up, and that the actual cost and reasonable value of the repairs, necessitated by reason of the disaster, and the incidental expense connected therewith, which libellant was compelled to and did make and pay, was at least the sum of \$775.00; that in waiting for dry dock and making the repairs to said canalboat, she was detained for a period of twenty-two days; and that the reasonable value of the use of the said canalboat while thus detained was at least the sum of \$220.00; and the total damage to libellant occasioned by reason of said disaster was the sum of \$995.00, which, with interest thereon from the 7th day of July, 1919, is the sum hereby sued for.

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VII. Upon information and belief that the steam tug Charlotte is now, or soon will be at the Port of Buffalo, or the port of Rochester, within the jurisdiction of this Honorable Court.

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VIII. Upon information and belief, that all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court. 121

WHEREFORE, libellant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steam tug "Charlotte," her engines, boilers, machinery, boats, tackle, apparel and furniture, and that all persons having or claiming any interest therein may be cited to appear and answer all and singular the premises, and that upon final hearing this Honorable Court will be pleased to decree payment to libellant of its damages aforesaid, with interest from the 7th day of July, 1919, and that the said steam tug "Charlotte," her engines, machinery, boilers, boats, tackle, apparel and furniture, may be condemned and sold to pay the same, and for such other and further relief as libellant may be entitled to receive. 122

GEO. WAGNER, SR.,
Libellant. 124

BROWN, ELY & RICHARDS,
Proctors for Libellant,
Office and P. O. Address,
1317 Chamber of Commerce,
Buffalo, N. Y.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.:
City of Buffalo, }

GEORGE WAGNER, being duly sworn deposes and says that he is the libellant above named; that he has read the foregoing libel and knows the contents thereof and

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the same is true to the best of his knowledge, information and belief.

GEORGE WAGNER, SR.

Subscribed and sworn to before me
this 25th day of September, 1919.

F. A. PARKER,

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*Notary Public in and for
Erie County: New York.*

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK.

I, HARRIS S. WILLIAMS, Clerk of the District Court
of the United States for the Western District of New
128 York, do hereby certify that I have compared the
annexed copy of Libel, with the Original entered and
on file in this office, and that the same is a correct
transcript therefrom, and of the whole of said
Original.

And I further certify that I am the officer in whose
custody it is required by law to be.

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IN TESTIMONY WHEREOF, I have caused the seal
of the said Court to be affixed at the City of
[SEAL] Buffalo, in said District, this 14th day of
October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

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" PAPER 4 "

UNITED STATES DISTRICT COURT — WEST-
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY.

MURRAY TRANSPORTATION COMPANY,
Bailee of United States Navy, Coal
Barge No. 483, Libellant,

132

against

The Steam Tug " HENRY KOERBER,
JR.," Her Boilers, Engines, Tackle,
Apparel and Furniture,
Respondent.

133

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE UNITED STATES DISTRICT
COURT, FOR THE WESTERN DISTRICT
OF NEW YORK:

The answer of Frank F. Fix and Charles Fix, doing
business under the name and style of Fix Brothers,
claimants of the Steam Tug " Henry Koerber, Jr.,"
her boilers, engines, tackle, apparel and furniture, to
the libel of Murray Transportation Company, Bailee
of United States Navy Coal Barge No. 483, in a cause
of collision, civil and maritime, alleges and shows to
the Court, upon information and belief, as follows: 134

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I.

Answering those certain allegations contained in
Paragraph First (1st) of the libel herein, these
respondents deny that they have any knowledge or

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information sufficient to form a belief concerning the same, and therefore leave libelant to its proof thereof in the premises.

II.

137 Answering those certain allegations contained in Paragraph Second (2nd) of the libel herein, these respondents admit the same.

III.

138 Answering those certain allegations contained in Paragraph Third (3rd) of the libel herein, these respondents allege that said allegations are in some part untrue and therefore deny the same; and these respondents allege that the truth and fact in regard to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth.

IV.

139 Answering those certain allegations contained in Paragraph Fourth (4th) of the libel herein, these respondents allege that the same are in great part untrue, and therefore deny the same and allege that the truth and fact with respect to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth.

V.

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Answering those certain allegations contained in Paragraph Fifth (5th) of the libel herein, these respondents deny that they have any knowledge or information sufficient to form a belief concerning the same, and therefore leave libelant to its proof thereof in the premises.

VI.

Answering those certain allegations contained in Paragraph Sixth (6th) of the libel herein, these respondents admit the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, but deny that all and singular the premises and allegations contained in said libel are true.

142

For a second, separate and further answer to the alleged cause of action set forth in the libel herein, these respondents allege and show to the Court, upon information and belief, as follows:

VII.

That at all the times hereinafter stated, respondents were and now are co-partners doing business under the name and style of Fix Brothers, at the City of Buffalo, New York, and that these respondents were and now are the owners of the Steam Tug "Henry Koerber, Jr.," her boilers, engines, tackle, apparel and furniture.

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VIII.

That at all the times hereinafter stated, the Steam Tug "Henry Koerber, Jr.," was and is a vessel of the United States of the burden of 84 tons and duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

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IX.

That at all the times hereinafter stated, Edward S. Walsh was and is the duly appointed and qualified Superintendent of Public Works of the State of New York; that by the provisions of Chapter 264 of the laws of 1919 of the State of New York, there was

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enacted by the Legislature of the State of New York, to be immediately effective, "An Act to authorize the Superintendent of Public Works to provide towing facilities on the State canals, and making an appropriation therefor."

X.

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That on or about the 16th day of May, 1919, these respondents entered into a charter party with said Edward S. Walsh, Superintendent of Public Works, a copy of which charter party is hereunto annexed and made a part of this Answer and to which respondents beg leave to refer upon the trial of this action;

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that under the terms of said charter party, respondents agreed to charter and let to the Superintendent of Public Works, and the Superintendent of Public Works agreed to hire the Steam Tug "Henry Koerber, Jr.," for the term beginning the 15th day of May, 1919, and ending on such date between the 15th day of November, 1919, and the 15th day of December, 1919, as might be determined by said Superintendent of Public Works, for which said charter and

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use of said vessel the Superintendent of Public Works therein agreed to pay these respondents at the rate of Twenty (\$20.00) Dollars per day, together with the amount of money actually paid by these respondents as wages to the crews manning said tug; and said Superintendent of Public Works therein further

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agreed to furnish all fuel and supplies necessary for the operation of said tug; that it was further therein agreed that said Tug should be operated in such manner and in such waters as said Superintendent of Public Works should direct, and that the crew should be acceptable to said Superintendent, and subject to dismissal by him.

That, as these respondents are informed and believe, thereafter and during the month of October, 1919, while said Tug "Henry Koerber, Jr.," was being operated by and under the control and direction of said Superintendent of Public Works, in accordance with the provisions of said charter party, said Tug "Henry Koerber, Jr.," was despatched on a voyage 152 over the Erie Canal from Tonawanda, N. Y., to Waterford, N. Y., in company with a second tug with a tow of four barges, one of which said barges was the No. 483; that said fleet was in command and under the charge of an employee of libelant; that all went well until Lock No. 6, adjacent to the easterly end of the Erie Canal, was reached, where, owing to the size of 153 Lock No. 6 and of other locks closely adjacent, it became necessary to break up the tow and despatch said barges in pairs through each of these several locks, respectively; that at Lock No. 6, the Tug "Henry Koerber, Jr.," was ordered to take the two head boats, one of which was the Barge No. 483, and proceed through the canal to the foot of Lock No. 2 154 and there wait for the remaining tug and two barges; that such order was given to the master of the Tug "Henry Koerber, Jr.," by the agent or employee of libelant who was in command of said fleet upon said voyage; that the "Henry Koerber, Jr.," thereupon, in accordance with said order, proceeded with said two barges in tow through Locks Nos. 6, 5 and 4; that when said Tug and tow reached 155 a point in the canal between Locks Nos. 4 and 3, the wind was blowing hard, which caused the after end of the tow to tail off across the canal, thus making it impossible for the Tug to keep the tow straightened up; that when such was observed to be

156 the fact, the master of the said Tug "Henry Koerber, Jr.," requested the man in charge of the head barge, which was the No. 483, to pass a line from the barge to the canal wall or bank, in order to hold the stern-boat up against the wind and snub the barges into the bank so that the tow might thus overcome the force of the wind and be straightened up in approaching
 157 the next lock; that the man in charge of said barge refused to put out such line as requested by the master of the Tug and the tow barges continued to tail off by the stern across the canal by reason of the wind, and while the Tug "Henry Koerber, Jr.," was endeavoring to straighten up the tow, the bow of the Barge No. 483 came in contact with the canal pier or wall.

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XII.

That as these respondents are informed and believe, the said collision between Barge No. 483 and the canal pier or wall and the resultant damages, if any, the extent of which are wholly unknown to these respondents, were caused wholly by the failure, want of care
 159 and neglect of the libelant or those in charge and command of the tow on behalf of the libelant, and without any fault upon the part of these respondents or of said Tug "Henry Koerber, Jr.," in the following, among other particulars:

1. In that the employee of libelant in charge of the tow was negligent and careless in the management of the navigation of the tow.
- 160 2. In that the employee of libelant in charge of the tow was new to the work, was incompetent, and was trying to make a record for speed in handling the tow on the voyage in question.
3. In that the operation of the tow and the order for the "Henry Koerber, Jr.," to break up the tow and proceed from Lock No. 6 to Lock No. 2 with two barges of the fleet, was given by the employee of libelant in charge of said fleet upon said voyage.

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4. In that the employee of libelant in charge of Barge No. 483 was incompetent, negligent and careless in refusing to pass a line ashore for the purpose of holding the two barges up from tailing off before the wind, when requested by the master of the "Henry Koerber, Jr." 161

5. In that the employee of libelant in charge of the tow failed to consider the weather at the time.

6. In that the Superintendent of Public Works of the State of New York completely controlled the navigation of and operated said Tug "Henry Koerber, Jr.", at the time of said disaster. 162

7. In that these respondents were wholly without any control over or direction of the navigation of said steam tug "Henry Koerber, Jr.", at the time of said disaster.

8. In that these respondents are total strangers to the entire subject matter of said disaster, for the reason that said tug "Henry Koerber, Jr.", was, at the time of said disaster, under charter to the Superintendent of Public Works, and was then navigated and operated under his sole control and direction. 163

XIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court. 164

WHEREFORE, these respondents pray that this Honorable Court will be pleased to pronounce against the said libel and to dismiss the same, and to condemn the libelant in costs, and otherwise right and justice to administer in the premises.

FIX BROTHERS, 165

By CHARLES FIX,
Claimants & Respondents.

STANLEY & GIDLEY,
Proctors for Claimants and Respondents,
1025 Marine Trust Co. Bldg.,
Buffalo, N. Y.

AGREEMENT AND CHARTER.

THIS CHARTER made this 16th day of May, 1919, between FIX BROS., of Buffalo, County of Erie, State of New York, hereinafter designated as the owner, party of the first part, and the People of the State of New York, through the Superintendent of Public Works, hereinafter designated as the Superintendent, party of the second part. WITNESSETH:

That the said owner doth hereby charter and lease unto the said Superintendent, for the term specified herein, to-wit, beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as may be determined hereafter by the said Superintendent, the following described property; namely, one tug boat, designated and named the "Henry Koerber, Jr.," the terms and conditions on which the charter of said tug is given and received being as follows:

1. The owner agrees that the said tug is in a tight, staunch, strong and sea worthy condition, and that its boiler and engine are in a perfect mechanical condition.

2. The owner agrees to keep and maintain said tug in a tight, staunch, strong and sea worthy condition, and to keep and maintain the engine, boiler, and mechanical appurtenances thereof in a perfect operating condition, and to that end all necessary repairs shall be promptly made by him from time to time. It is further covenanted and agreed that in the event that necessary repairs to said tug, or its operating machinery, are not promptly made by said owner, the Superintendent shall have the option of dismissing said tug from the service, and terminating this charter, or, in his discretion, he may make such repairs as,

in his judgment, may be necessary, at the cost and expense of said owner.

3. The said tug shall be delivered by said owner to the Superintendent in the condition described above on the 15th day of May, 1919, at the port of Buffalo, properly equipped for immediate operation with a master and crews necessary and proper to operate said tug in two tricks or watches per day. 172

4. When said tug shall have been delivered to the Superintendent on the date specified above, the same shall be operated in such manner and in such waters as he shall direct.

5. The owner undertakes and agrees that the master and crews to be employed on said tug shall be competent and qualified to perform the duties of such positions, and shall be acceptable to the Superintendent. The owner also agrees that the master of said tug, and the crew or crews, or any member of the same, shall be immediately dismissed by him upon notice so to do from the Superintendent given personally or mailed to the owner at the address above mentioned, and that any place so made vacant will at once be filled by said owner with a person acceptable to the Superintendent. It is also agreed that the Superintendent, if in his judgment the interests of the State so require, shall have the right to dismiss the master and all of the crews on said tug and man the tug with men selected by him. 173 174

6. The owner further agrees that if, at any time before the termination of this charter, the said tug, in the judgment of the Superintendent, becomes unfit to perform the service required of it, the Superintendent may dismiss said tug and terminate this charter upon five days' notice to said owner, given as 175

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176 hereinbefore provided, setting forth the reasons for the proposed termination of said charter. The said owner also agrees that this charter may be terminated by the Superintendent for any cause, upon thirty days' notice to said owner, given as hereinbefore provided.

177 7. Upon the termination of this charter the Superintendent agrees to deliver said tug to the owner, excepting in case of accident or disability of the boat, at the port of Buffalo.

178 8. The Superintendent agrees that he shall allow the owner such time as may be necessary to clean the boiler of said tug once in three weeks, provided, however, that such cleaning work shall be performed at such time and place as shall be designated by the Superintendent after application to him, and in no event shall such cleaning work consume more than 24 hours in any three weeks. For any loss of use of said tug other than that for the cleaning of the boiler of said tug, it is agreed that the Superintendent shall deduct from any compensation due or to become due 179 the said owner one-half of the per diem rate for such loss of use, provided that such loss of use does not extend beyond a period of five days. In the event of loss of use of said tug in excess of five days, it is agreed that the Superintendent may dismiss said tug and terminate this charter, or he may deduct from any compensation due or to become due the said 180 owner the per diem rate for such days in excess of five days that the Superintendent may be without the service of said tug.

9. In the event that the master and crews, or either of them, fail in the performance of their duties on said tug, or neglect or refuse to comply with directions given them by the Superintendent, which failure, neglect or refusal results in any loss of use of said tug,

the Superintendent shall have the power to deduct from any compensation due or to become due said owner the per diem rate covering the day or days during which the use of said tug has been lost by reason of such failure or neglect or refusal of the master or crews.

10. In consideration of the use of said tug and the fulfillment by said owner of the terms and conditions above specified, the Superintendent agrees to pay to said owner for the use of said tug at the rate of \$20.00, Twenty & 00/100 Dollars, per day, and the amount of money actually and necessarily paid by said owner as wages to the crews manning the said tug; payments to be made to said owner as follows: of the sum first mentioned, that portion which shall be deemed as covering the use of said tug, at the daily rate referred to shall be paid to said owner on or before the 5th day of the month following that during which the Superintendent has had the use of said tug; that portion of the total monthly payments which shall be deemed to cover the actual amount due to the crews on said tug shall be paid semi-monthly, one-half thereof on or about the 15th day of the month, and one-half thereof on or about the last day of the month. It is agreed by and between the parties hereto that the owner of said tug shall be entitled to receive from the Superintendent only such amount as will actually be required to pay the wages of the men employed by him on said tug, or to reimburse him for moneys necessarily expended by him for that purpose, but in no event shall said owner be entitled to receive from the Superintendent any sum in excess of the moneys actually paid or to be paid for crews actually and necessarily employed on said tug, excepting the sum fixed herein as payment for the use of said tug at the rate hereinbefore specified.

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11. In addition to the payments hereinbefore agreed upon be made to said owner, the Superintendent agrees to furnish to said owner all fuel and supplies necessary for the operation of said tug.

187

IN WITNESS WHEREOF, the parties thereto have hereunto set their hands and seals this 16th day of May, 1919.

FIX BROTHERS (SEAL)

By CHARLES FIX. (SEAL)

E. S. WALSH,
Superintendent of Public Works.

(SEAL)

Approved June 16, 1919.

188

W. J. MAIER,
*Deputy State Comptroller,
Under Chapter 949.*

STATE OF NEW YORK, } ss.:
COUNTY OF ERIE, }

189

On this 6th day of June, 1919, before me, the subscriber, personally appeared Charles Fix, to me known and known to me to be the individual who executed the foregoing instrument as a member of the co-partnership of Fix Bros., who, being by me duly sworn, did depose and say, that he resides in Buffalo, N. Y. that he is a member of the above named co-partnership which is composed of himself and Frank Fix, who are all the persons interested therein; that he executed the foregoing instrument on behalf of the said co-partnership and as a member thereof; that he was authorized to execute the same; and he acknowledged to me that he executed the same on behalf of the said co-partnership for the purposes therein stated.

190

C. G. BABCOCK,
Notary Public, Erie County.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.:
WESTERN DISTRICT OF N. Y. }

Charles Fix, being duly sworn, deposes and says that he is one of the respondents in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. 192

CHARLES FIX.

Sworn to before me this 7th day
of June, 1920.

CLYDE JOSLIN,
Notary Public. 193

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Answer with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 194

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, 1920. 195

[SEAL]

HARRIS S. WILLIAMS,
Clerk.

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" PAPER 5 "

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK—IN
ADMIRALTY

197

WILLIAM J. DOLLOFF, *Libelant*,*against*The Steam Tug " CHARLOTTE," Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

198

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
NEW YORK:

The answer of Frank F. Fix and Charles Fix, doing
199 business under the name and style of Fix Brothers,
claimants of the steam tug " Charlotte," her engines,
boilers, machinery, boats, tackle, apparel and furniture,
to the libel of William J. Dolloff, in a cause of collision,
civil and maritime, alleges and shows to the Court,
upon information and belief, as follows:

FIRST: Answering those certain allegations con-
tained in paragraph First of the libel herein, these
200 respondents deny that they have any knowledge or
information sufficient to form a belief concerning the
same, and therefore leave libelant to its proof thereof
in the premises.

SECOND: Answering those certain allegations con-
tained in paragraph Second of the libel herein, these
respondents admit the same.

THIRD: Answering those certain allegations contained in paragraph Third of the libel herein, these respondents deny that they have any knowledge or information sufficient to form a belief concerning the same, and therefore leave libelant to its proof thereof in the premises.

FOURTH: Answering those certain allegations contained in paragraph Fourth of the libel herein, these respondents allege that the same are in great part untrue, and therefore deny the same, and allege that the truth and fact with respect to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth. 202

FIFTH: Answering those certain allegations contained in paragraph Fifth of the libel herein, these respondents allege that the same are in great part untrue, and therefore deny the same, and allege that the truth and fact with respect to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth. 203

SIXTH: Answering those certain allegations contained in paragraph Sixth of the libel herein, these respondents deny that they have knowledge or information sufficient to form a belief concerning same, and therefore leave libelant to its proof thereof in the premises. 204

SEVENTH: Answering those certain allegations contained in paragraph Seventh of the libel herein, these respondents admit the same. 205

EIGHTH: Answering those certain allegations contained in paragraph Eighth of the libel herein, these respondents admit the admiralty and maritime jurisdiction of this Honorable Court, but deny that all and singular the premises contained in said libel, are true.

206

For a second, separate and further answer to the alleged cause of action set forth in the libel herein, these respondents allege and show to the Court, upon information and belief, as follows:

207

NINTH: That at all the times hereinafter stated, respondents were and now are copartners doing business under the name and style of Fix Brothers, at the City of Buffalo, New York, and that these respondents were and now are the owners of the steam tug "Charlotte," her engines, boilers, boats, machinery, tackle, apparel and furniture.

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TENTH: That at all the times hereinafter stated, the steam tug "Charlotte" was and is a vessel of the United States, of the burden of thirty-nine (39) tons, duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

209

ELEVENTH: That at all the times hereinafter stated, Edward S. Walsh was and is the duly appointed and qualified Superintendent of Public Works of the State of New York; that by the provisions of chapter 264 of the Laws of 1919 of the State of New York, there was enacted by the Legislature of the State of New York, to be immediately effective "an act to authorize the Superintendent of Public Works to provide towing facilities on the State canals, and making an appropriation therefor."

210

TWELFTH: That on or about the 16th day of May, 1919, these respondents entered into a charter party with the said Edward S. Walsh, Superintendent of Public Works, a copy of which charter party is hereto annexed and made a part of this answer, and to which respondents beg leave to refer upon the trial of this action; that under the terms of said charter party

respondents agreed to let to the Superintendent of Public Works, and the Superintendent of Public Works agreed to hire the steam tug "Charlotte" for the term beginning the 15th day of May, 1919, and ending on such date between the 15th day of November, 1919 and the 15th day of December, 1919, as might be determined by said Superintendent of Public Works, for which said charter and use of said vessel the Superintendent of Public Works therein agreed to pay these respondents at the rate of twenty (\$20.00) dollars per day together with the amount of money actually paid by these respondents as wages to the crews manning said tug; and the said Superintendent of Public Works further agreed to furnish all fuel and supplies necessary for the operation of said tug; that it was further therein agreed that said tug should be operated in such manner and in such waters as said Superintendent of Public Works should direct, and that the crew should be acceptable to said Superintendent of Public Works and subject to dismissal by him. 211 212 213

THIRTEENTH: That as these respondents are informed and believe, thereafter and on or about the 6th day of July, 1919, while the said tug "Charlotte" was being operated by and under the control and direction of said Superintendent of Public Works in accordance with the provisions of said charter party, said tug "Charlotte" was despatched on a voyage westward over the Erie canal from Waterford, New York, with a tow of five canal boats, two of which said boats were the "Joseph Weed" and the "Romaine;" that at the time said tug "Charlotte" took the fleet of five canal boats in tow, the said vessels were all light and without cargo, and were coupled together in the same 214 215

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manner as they voyaged from New York to Waterford, to wit: three of said boats being coupled together closely on the starboard side, and two of said boats being likewise coupled closely together on the port side, the two bow boats being abreast; that when said tug "Charlotte" picked up the said five canal boats two
217 hawsers, each about seventy-five (75) feet long, were cast astern from the "Charlotte" and one of said hawsers attached to the bow of each of the bow boats; that all went well until about the middle of the afternoon of the following day, July 7th, when the said tug "Charlotte" and fleet of five canal boats had reached a point adjacent to the stop-gate located about three miles east of Little Falls, N. Y. That at this time the
218 said fleet of five canal boats were coupled together in the same manner as they had been when they were first taken in tow by the tug "Charlotte" and still remained light and without cargo; that when the said steam tug "Charlotte" approached the said stop-gate, the wind was blowing strong straight across the canal, from port to starboard, and as the fleet of five canal
219 boats being towed behind the tug "Charlotte" proceeded around the bend in approaching said stop-gate, the various canal boats so being towed became exposed and subjected to the full force of this wind; that as the said tug "Charlotte" entered the guard-lock at that point to pass through said lock, it was navigated and directed as closely to the port side of the canal and abutment of the canal as possible, the port side of the
220 tug being within a foot of the abutment as it passed along, such maneuver being for the purpose of holding the said five canal boats, so being towed, up in the center of the channel as much as possible and to offset the force of the wind; that as the said tug "Charlotte" passed into the guard-lock with the said five canal boats

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following around the bend east of the guard-lock, the 221
said canal boats began to tail off across the canal to
starboard by reason of the wind, and continued to do
so in approaching the guard-lock, although the said
tug "Charlotte" was at all times in approaching and
entering the guard-lock held over to the port side of
the navigable channel as far as was possible, and that
by reason of the effect of the wind the said five canal 222
boats continued to tail off until the said vessels came
in contact with the guard-lock upon the starboard side,
the foremost boat of those being towed upon the star-
board side striking the abutment; that when said tug
"Charlotte" was passing through the guard-lock, as
hereinbefore set forth, and it was seen that, although
the said tug was being held over to port as much as 223
possible, said five canal boats being light were tailing
off to starboard before the wind to such an extent that
collision with the guard-lock on the starboard side was
possible, that the usual and proper signals to stop the
said tug "Charlotte" were given, and that the said
tug "Charlotte" was promptly stopped, but that not-
withstanding the efforts made by those in charge of her 224
navigation to avoid such collision, the foremost boat on
the starboard side of the said tow came in contact, as
stated, with the guard-lock upon the starboard side of
the canal.

FOURTEENTH: That as these respondents are in-
formed and believe, said collision between the said
canal boats and the canal abutment or wall and the
resultant damages, if any, the extent of which is wholly 225
unknown to these respondents, were caused wholly by
the failure, want of care and neglect of libellant or those
in charge of the said canal boats "Joseph Weed"
and "Romaine," or in charge of said tow on behalf
of libellant, and without any fault upon the part of

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these respondents or of said tug "Charlotte," in the following, among other particulars:

227

1. In that the libelant, or his employees in charge of canalboats "Joseph Weed" and "Romaine," was negligent and careless in the management of the navigation of the canalboats.

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2. In that the libelant, or his agent, servant or employee in charge of the tow failed to consider the force and direction of the wind while approaching the guard-lock.

3. In that libelant or his agent, servant or employee in charge of the tow failed to direct the course of said canalboats and the remaining boats in the tow to the port hand side of the canal and thus follow the said tug in proceeding through the guard-lock.

229

4. In that the said canal boats making up the tow were without any sufficient lookout.

5. In that the libelant's canal boats and the remaining boats of the tow failed to have a man or men stationed on board of said boats so that the towing hawser might be cast off when approaching said guard-lock, if the necessity therefor became apparent.

230

6. In that the Superintendent of Public Works of the State of New York completely controlled the navigation of and operated the said tug at the time of said disaster.

7. In that these respondents were wholly without any control over or direction of the navigation of said Steam Tug "CHARLOTTE" at the time of said disaster.

8. In that these respondents are total strangers to the entire subject matter of said disaster, for the reason that said Steam Tug "CHARLOTTE" was at the time of said disaster under charter to the Superintendent of Public Works and was then navigated and operated under his sole control and direction.

FIFTEENTH: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, These respondents pray that this Honorable Court will be pleased to pronounce against the said libel, and to dismiss the same, and to condemn the libelant in costs and otherwise right and justice administer in the premises. 232

FIX BROTHERS,

By CHARLES FIX,

Claimants and Respondents.

STANLEY & GIDLEY,

Proctors for Responders,

Office and P. O. Address,

1025 Marine Trust Co. Bldg., Buffalo N. Y. 233

AGREEMENT AND CHARTER.

This Charter made this 16th day of May, 1919, between Fix Brothers of Buffalo, County of Erie, State of New York, hereinafter designated as the owner, party of the first part, and the People of the State of New York, through the Superintendent of Public Works, hereinafter designated as the Superintendent, party of the second part. Witnesseth: 234

That the said owner doth hereby charter and lease unto the said Superintendent, for the term specified herein, to wit, beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as may be determined hereafter by the said Superintendent, the following described property; namely, one tug boat, designated and named the "Charlotte," the terms and 235

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236 conditions on which the charter of said tug is given and received being as follows:

1. The owner agrees that the said tug is in a tight, staunch, strong and sea worthy condition, and that its boiler and engine are in a perfect mechanical condition.

237 2. The owner agrees to keep and maintain said tug in a tight, staunch, strong and sea worthy condition, and to keep and maintain the engine, boiler, and mechanical appurtenances thereof in a perfect operating condition, and to that end all necessary repairs shall be promptly made by him from time to time. It is further covenanted and agreed that in the event that necessary repairs to said tug, or its operating machinery, are not promptly made by said owner, the Super-
238 intendent shall have the option of dismissing said tug from the service, and terminating this charter, or, in his discretion, he may make such repairs as, in his judgment, may be necessary, at the cost and expense of said owner.

3. The said tug shall be delivered by said owner to the Superintendent in the condition described above
239 on the 15th day of May, 1919, at the port of Buffalo, properly equipped for immediate operation with a master and crews necessary and proper to operate said tug in two tricks or watches per day.

4. When said tug shall have been delivered to the Superintendent on the date specified above, the same shall be operated in such manner and in such waters as he shall direct.
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5. The owner undertakes and agrees that the master and crews to be employed on said tug shall be competent and qualified to perform the duties of such positions, and shall be acceptable to the Superintendent. The owner also agrees that the master of said tug, and the crew or crews, or any member of the same,

shall be immediately dismissed by him upon notice so
to do from the Superintendent given personally or
mailed to the owner at the address above mentioned,
and that any place so made vacant will at once be filled
by said owner with a person acceptable to the Super-
intendent. It is also agreed that the Superintendent,
if in his judgment the interests of the State so require,
shall have the right to dismiss the master and all of
the crews on said tug and man the tug with men selected
by him. 241 242

6. The owner further agrees that if, at any time
before the termination of this charter, the said tug, in
the judgment of the Superintendent, becomes unfit to
perform the service required of it, the Superintendent
may dismiss said tug and terminate this charter upon
five days' notice to said owner, given as hereinbefore
provided, setting forth the reasons for the proposed
termination of said charter. The said owner also
agrees that this charter may be terminated by the Super-
intendent for any cause, upon thirty days' notice to
said owner, given as hereinbefore provided. 243

7. Upon the termination of this charter, the Super- 244
intendent agrees to deliver said tug to the owner, ex-
cepting in case of accident or disability of the boat, at
the port of Buffalo.

8. The Superintendent agrees that he shall allow the
owner such time as may be necessary to clean the boiler
of said tug once in three weeks, provided, however,
that such cleaning work shall be performed at such time
and place as shall be designated by the Superintendent
after application to him, and in no event shall such
cleaning work consume more than twenty-four hours
in any three weeks. For any loss of use of said tug
other than that for the cleaning of the boiler of said
tug, it is agreed that the Superintendent shall deduct 245

246 from any compensation due or to become due the said owner one-half of the per diem rate for such loss of use, provided that such loss of use does not extend beyond a period of five days. In the event of loss of use of said tug in excess of five days, it is agreed that the Superintendent may dismiss said tug and terminate this charter, or he may deduct from any compensation 247 due or to become due the said owner the per diem rate for such days in excess of five days that the Superintendent may be without the service of said tug.

9. In the event that the master and crews, or either of them, fail in the performance of their duties on said tug, or neglect or refuse to comply with directions given them by the Superintendent, which failure, 248 neglect or refusal results in any loss of use of said tug, the Superintendent shall have the power to deduct from any compensation due or to become due said owner the per diem rate covering the day or days during which the use of said tug has been lost by reason of such failure or neglect or refusal of the master or crews.

10. In consideration of the use of said tug and the 249 fulfillment by said owner of the terms and conditions above specified, the Superintendent agrees to pay to said owner for the use of said tug at the rate of \$20.00, twenty & 00/100 dollars, per day, and the amount of money actually and necessarily paid by said owner as wages to the crews manning the said tug; payments to be made to said owner as follows: of the sum first mentioned, that portion which shall be deemed as cover- 250 ing the use of said tug, at the daily rate referred to, shall be paid to said owner on or before the 5th day of the month following that during which the Superintendent has had the use of said tug; that portion of the total monthly payments which shall be deemed to cover the actual amount due to the crews on said tug shall be paid semi-monthly, one-half thereof on or about

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251

the 15th day of the month, and one-half thereof on or about the last day of the month. It is agreed by and between the parties hereto that the owner of said tug shall be entitled to receive from the Superintendent only such amount as will actually be required to pay the wages of the men employed by him on said tug, or to reimburse him for moneys necessarily expended by him for that purpose but in no event shall said owner be entitled to receive from the Superintendent any sum in excess of the moneys actually paid or to be paid for crews actually and necessarily employed on said tug, excepting the sum fixed herein as payment for the use of said tug at the rate hereinbefore specified. 252

11. In addition to the payments hereinbefore agreed upon be made to said owner, the Superintendent agrees to furnish to said owner all fuel and supplies necessary for the operation of said tug. 253

IN WITNESS WHEREOF, the parties thereto have hereunto set their hands and seals this 16th day of May, 1919.

FIX BROS. [SEAL]

By CHARLES FIX. [SEAL]

254

E. S. WALSH,

Superintendent of Public Works.

APPROVED, June 16, 1919. [SEAL]

W. J. MAIER, Deputy State Comp.
(Co-partnership.)

STATE OF NEW YORK, } ss.:
COUNTY OF ERIE,

255

On this 6th day of June, 1919, before me, the subscriber, personally appeared Charles Fix, to me known and known to me to be the individual who executed the foregoing instrument as a member of the co-part-

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256 nership of Fix Bros., who, being by me duly sworn,
 did depose and say, that he resides in Buffalo, N. Y.,
 that he is a member of the above named co-partnership
 which is composed of himself and Frank Fix, who are
 all the persons interested therein; that he executed the
 foregoing instrument on behalf of the said co-partner-
 ship and as a member thereof; that he was authorized
 257 to execute the same; and he acknowledged to me that
 he executed the same on behalf of the said co-partner-
 ship for the purposes therein stated.

C. G. BABCOCK,
Notary Public,
Erie County.

258 STATE OF NEW YORK, }
 COUNTY OF ERIE, } ss.:
 CITY OF BUFFALO, }

Charles Fix, being duly sworn, deposes and says
 that he is one of the claimants and respondents in
 this action; that he has read the foregoing answer and
 knows the contents thereof; that the same is true to
 259 the knowledge of deponent, except as to the matters
 therein stated to be alleged on information and belief,
 and as to those matters he believes it to be true.

CHARLES FIX.

Sworn to before me this —
 day of June, 1920.

260 CLYDE JOSLIN,
 Notary Public,
 Erie Co.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK. }

I, HARRIS S. WILLIAMS, Clerk of the District Court
 of the United States for the Western District of New

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York, do hereby certify that I have compared the annexed copy of Answer with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

“ PAPER 6 ”

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK—IN
ADMIRALTY.

GEORGE WAGNER, *Libellant,*

against

The Steam Tug “ Charlotte ” Her En-
gines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE DISTRICT COURT OF THE UNITED
STATES, FOR THE WESTERN DISTRICT OF
NEW YORK:

The answer of Frank F. Fix and Charles Fix, doing
business under the name and style of Fix Brothers,

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claimants of the steam tug "Charlotte," her engines, boilers, machinery, boats, tackle, apparel and furniture, to the libel of George Wagner, in a cause of collision, civil and maritime, alleges and shows to the Court, upon information and belief as follows:

267

FIRST: Answering those certain allegations contained in paragraph First of the libel herein, these respondents deny that they have any knowledge or information sufficient to form a belief concerning the same, and therefore leave libelant to its proof thereof in the premises.

268

SECOND: Answering those certain allegations contained in paragraph Second of the libel herein, these respondents admit the same.

THIRD: Answering those certain allegations contained in paragraph Third of the libel herein, these respondents deny that they have any knowledge or information sufficient to form a belief concerning the same, and therefore leave libelant to its proof thereof in the premises.

269

FOURTH: Answering those certain allegations contained in paragraph Fourth of the libel herein, these respondents allege that the same are in great part untrue, and therefore deny the same, and allege that the truth and fact with respect to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth.

270

FIFTH: Answering those certain allegations contained in paragraph Fifth of the libel herein, these respondents allege that the same are in great part untrue, and therefore deny the same, and allege that the truth and fact with respect to the allegations therein contained, as these respondents are informed and believe, is as is hereinafter more particularly set forth.

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SIXTH: Answering those certain allegations contained in paragraph Six of the libel herein, these respondents deny that they have any knowledge or information sufficient to form a belief concerning same, and therefore leave libelant to its proof thereof in the premises. 271

SEVENTH: Answering those certain allegations contained in paragraph Seven of the libel herein, these respondents admit the same. 272

EIGHTH: Answering those certain allegations contained in paragraph Eighth of the libel herein, these respondents admit the admiralty and maritime jurisdiction of this Honorable Court, but deny that all and singular the premises contained in said libel are true.

For a second, separate and further answer to the alleged cause of action set forth in the libel herein, these respondents allege and show to the Court, upon information and belief, as follows: 273

NINTH: That at all the times hereinafter stated, respondents were and now are co-partners doing business under the name and style of Fix Brothers, at the City of Buffalo, New York, and that these respondents were and now are the owners of the steam tug "Charlotte," her engines, boilers, boats, machinery, tackle, apparel and furniture. 274

TENTH: That at all the times hereinafter stated the steam tug "Charlotte" was and is a vessel of the United States, of the burden of thirty-nine (39) tons, duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters. 275

ELEVENTH: That at all the times hereinafter stated, Edward S. Walsh was and is the duly appointed and qualified Superintendent of Public Works of the State

276

of New York; that by the provisions of chapter 264 of the Laws of 1919 of the State of New York, there was enacted by the Legislature of the State of New York, to be immediately effective "an act to authorize the Superintendent of Public Works to provide towing facilities on the State canals, and making an appropriation therefor."

277

TWELFTH: That on or about the 16th day of May, 1919, these respondents entered into a charter party with said Edward S. Walsh, Superintendent of Public Works, a copy of which charter party is hereunto annexed and made a part of this answer, and to which respondents beg leave to refer upon the trial of this action; that under the terms of said charter party

278 respondents agree to let to the Superintendent of Public Works, and the Superintendent of Public Works agreed to hire the steam tug "Charlotte" for the term beginning the 15th day of May, 1919, and ending on such date between the 15th day of November, 1919 and the 15th day of December, 1919, as might be determined by said Superintendent of Public Works,

279 for which said charter and use of said vessel, the Superintendent of Public Works therein agreed to pay these respondents at the rate of twenty (\$20.00) dollars per day, together with the amount of money actually paid by these respondents as wages to the crews manning said tug; and the said Superintendent of Public Works further agreed to furnish all fuel and supplies necessary for the operation of said tug; that it was further

280 therein agreed that said tug should be operated in such manner and in such waters as said Superintendent of Public Works should direct, and that the crew should be acceptable to said Superintendent of Public Works and subject to dismissal by him.

THIRTEENTH: That as these respondents are informed and believe, thereafter and on or about the 6th day of July, 1919, while the said tug "Charlotte" was being operated by and under the control and direction of said Superintendent of Public Works in accordance with the provisions of said charter party, said tug "Charlotte" was despatched on a voyage westward over the Erie canal from Waterford, New York, with a tow of five canal boats, one of which said boats was the John Monk; that at the time said tug "Charlotte" took the said fleet of five canal boats in tow, the said vessels were all light and without cargo, and were coupled together in the same manner as they voyaged from New York to Waterford, to wit: three of said boats being coupled together closely on the starboard side, and two of said boats being likewise coupled closely together on the port side, the two bow boats being abreast; that when said tug "Charlotte" picked up the said five canal boats two hawsers, each about seventy-five (75) feet long, were cast astern from the "Charlotte" and one of said hawsers attached to the bow of each of the bow boats; that all went well until about the middle of the afternoon of the following day, July 7th, when the said tug "Charlotte" and fleet of five canal boats had reached a point adjacent to the stop-gate located about three miles east of Little Falls, N Y. That at this time the said fleet of five canal boats were coupled together in the same manner as they had been when they were first taken in tow by the tug "Charlotte" and still remained light and without cargo. That when the said steam tug "Charlotte" approached the said stop-gate, the wind was blowing strong straight across the canal, from port to starboard, and as the fleet of five canal

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boats being towed behind the tug "Charlotte" proceeded around the bend in approaching said stop-gate, the various canal boats so being towed became exposed and subjected to the full force of this wind; that as the said tug "Charlotte" entered the guard-lock at that point to pass through said lock it was

287 navigated and directed as closely to the port side of the canal and abutment of the canal as possible the port side of the tug being within a foot of the abutment as it passed along, such maneuver being for the purpose of holding the said five canal boats so being towed up in the center of the channel as much as possible and to offset the force of the wind; that as the said tug "Charlotte" passed into the guard-lock

288 with the said five canal boats following around the bend east of the guard-lock the said canal boats began to tail off across the canal to starboard by reason of the wind and continued to do so in approaching the guard-lock although the said tug "Charlotte" was at all times in approaching and entering the guard-lock held over to the port side of the navigable channel as

289 far as was possible and that by reason of the effect of the wind the said five canal boats continued to tail off until the said vessels came in contact with the guard-lock upon the starboard side, the foremost boat of those being towed upon the starboard side striking the abutment. That when said tug "Charlotte" was passing through the guard-lock, as hereinbefore set forth, and

290 it was seen that, although the said tug was being held over to port as much as possible, said five canal boats being light were tailing off to starboard before the wind to such an extent that collision with the guard-lock on the starboard side was possible, that the usual and proper signals to stop the said tug "Charlotte" were given, and that the said tug "Charlotte" was

promptly stopped, but that notwithstanding the efforts made by those in charge of her navigation to avoid such collision, the foremost boat on the starboard side of the said tow came in contact, as stated, with the guard-lock upon the starboard side of the canal. 291

FOURTEENTH: That as these respondents are informed and believe, said collision between the said canal boats and canal abutment or wall and the resultant damages, if any, the extent of which is wholly unknown to these respondents, were caused wholly by the failure, want of care and neglect of libelant or those in charge of the said canal boat, John Monk, or in charge of said tow on behalf of libelant, and without any fault upon the part of these respondents or of said tug "Charlotte," in the following, among other particulars: 292 293

1. In that the libelant, or his employees, in charge of canal boat John Monk, was negligent and careless in the management of the navigation of the canal boat.

2. In that the libelant or his agent, servant or employee in charge of the tow failed to consider the force and direction of the wind while approaching the guard-lock. 294

3. In that the libelant or his agent, servant or employee in charge of the tow failed to direct the course of said canal boat and the remaining boats in the tow to the porthand side of the canal and thus follow the said tug in proceeding through the guard-lock.

4. In that the said canal-boats making up the tow were without any sufficient lookout. 295

5. In that the libelant's canal boat and the remaining boats of the tow failed to have a man or men stationed on board of said boats so that the towing hawser might be cast off when approaching

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said guard-lock, if the necessity therefor became apparent.

6. In that the Superintendent of Public Works of the State of New York completely controlled the navigation of and operated the said tug at the time of said disaster.

297

7. In that these respondents were wholly without any control over or direction of the navigation of said Steam Tug "CHARLOTTE" at the time of said disaster.

298

8. In that these respondents are total strangers to the entire subject matter of said disaster, for the reason that said Steam Tug "CHARLOTTE" was at the time of said disaster under charter to the Superintendent of Public Works and was then navigated and operated under his sole control and direction.

FIFTEENTH: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

299

WHEREFORE, these respondents pray that this Honorable Court will be pleased to pronounce against the said libel, and to dismiss the same, and to condemn the libellant in costs and otherwise right and justice administer in the premises.

FIX BROTHERS,

By CHARLES FIX,

Claimants and Respondents.

STANLEY & GIDLEY,

300

Proctors for Respondents,

Office and P. O. Address,

1025 Marine Trust Co. Bldg.,

Buffalo, N. Y.

AGREEMENT AND CHARTER.

THIS CHARTER made this 16th day of May, 1919, between Fix Bros., of Buffalo, County of Erie, State of New York, hereinafter designated as the owner, party of the first part, and the PEOPLE OF THE STATE OF NEW YORK, through the Superintendent of Public Works, hereinafter designated as the Superintendent, party of the second part, WITNESSETH:

That the said owner doth hereby charter and lease unto the said Superintendent, for the term specified herein, to wit, beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as may be determined by the said Superintendent, the following described property; namely, one tug boat, designated and named the "CHARLOTTE," the terms and conditions on which the charter of said tug is given and received being as follows:

1. The owner agrees that the said tug is in a tight, staunch, strong and sea worthy condition, and that its boiler and engine are in a perfect mechanical condition.

2. The owner agrees to keep and maintain said tug in a tight, staunch, strong and sea worthy condition, and to keep and maintain the engine, boiler, and mechanical appurtenances thereof in a perfect operating condition, and to that end all necessary repairs shall be promptly made by him from time to time. It is further covenanted and agreed that in the event that necessary repairs to said tug, or its operating machinery, are not promptly made by said owner, the Superintendent shall have the option of dismissing said tug from the service, and terminating this charter, or, in his discretion, he may make such repairs, as, in

306 his judgment, may be necessary, at the cost and expense of said owner.

3. The said tug shall be delivered by said owner to the Superintendent in the condition described above on the 15th day of May, 1919, at the port of Buffalo, properly equipped for immediate operation with a master and crews necessary and proper to operate
307 said tug in two tricks or watches per day.

4. When said tug shall have been delivered to the Superintendent on the date specified above, the same shall be operated in such manner and in such waters as he shall direct.

5. The owner undertakes and agrees that the master and crews to be employed on said tug shall be competent and qualified to perform the duties of such positions, and shall be acceptable to the Superintendent.
308 The owner also agrees that the master of said tug, and the crew or crews, or any member of the same, shall be immediately dismissed by him upon notice so to do from the Superintendent given personally or mailed to the owner at the address above mentioned, and that
309 any place so made vacant will at once be filled by said owner with a person acceptable to the Superintendent. It is also agreed that the Superintendent, if in his judgment the interests of the State so require, shall have the right to dismiss the master and all of the crews on said tug and man the tug with men selected by him.

6. The owner further agrees that if, at any time
310 before the termination of this charter, the said tug, in the judgment of the Superintendent, becomes unfit to perform the service required of it, the Superintendent may dismiss said tug and terminate this charter upon five days' notice to said owner, given as hereinbefore provided, setting forth the reasons for the proposed termination of said charter. The said owner

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also agrees that this charter may be terminated by the Superintendent for any cause, upon thirty days' notice to said owner, given as hereinbefore provided.

7. Upon the termination of this charter the Superintendent agrees to deliver said tug to the owner, excepting in case of accident or disability of the boat, at the port of Buffalo.

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8. The Superintendent agrees that he shall allow the owner such time as may be necessary to clean the boiler of said tug once in three weeks, provided, however, that such cleaning work shall be performed at such time and place as shall be designated by the Superintendent after application to him, and in no event shall such cleaning work consume more than 24 hours in any three weeks. For any loss of use of said tug other than that for the cleaning of the boiler of said tug, it is agreed that the Superintendent shall deduct from any compensation due or to become due the said owner one-half of the per diem rate for such loss of use, provided that such loss of use does not extend beyond a period of five days. In the event of loss of use of said tug in excess of five days, it is agreed that the Superintendent may dismiss said tug and terminate this charter, or he may deduct from any compensation due or to become due the said owner the per diem rate for such days in excess of five days that the Superintendent may be without the service of said tug.

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9. In the event that the master and crews, or either of them, fail in the performance of their duties on said tug, or neglect or refuse to comply with directions given them by the Superintendent, which failure, neglect or refusal results in any loss of use of said tug, the Superintendent shall have the power to deduct

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from any compensation due or to become due said owner the per diem rate covering the day or days during which the use of said tug has been lost by reason of such failure or neglect or refusal of the master or crews.

317

10. In consideration of the use of said tug and the fulfillment by said owner of the terms and conditions above specified, the Superintendent agrees to pay to said owner for the use of said tug at the rate of \$20.00, Twenty & 00/100 Dollars, per day, and the amount of money actually and necessarily paid by said owner as wages to the crews manning the said tug; payments to be made to said owner as follows: of the sum first mentioned, that portion which shall be deemed as covering the use of said tug, at the daily rate referred to, shall be paid to said owner on or before the 5th day of month following that during which the Superintendent has had the use of said tug; that portion of the total monthly payments which shall be deemed to cover the actual amount due to the crews on said tug shall be paid semi-monthly, one-half thereof on or about the 15th day of the month, and one-half thereof on or about the last day of the month. It is agreed by and between the parties hereto that the owner of said tug shall be entitled to receive from the Superintendent only such amount as will actually be required to pay the wages of the men employed by him on said tug, or to reimburse him for moneys necessarily expended by him for that purpose, but in no event shall said owner be entitled to receive from the Superintendent any sum in excess of the moneys actually paid or to be paid for crews actually and necessarily employed on said tug, excepting the sum fixed herein as payment for the use of said tug at the rate hereinbefore specified.

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11. In addition to the payments hereinbefore agreed

Paper 6

upon be made to said owner, the Superintendent agrees 321
to furnish to said owner all fuel and supplies necessary
for the operation of said tug.

IN WITNESS WHEREOF, the parties thereto have here-
unto set their hands and seals this 16th day of May,
1919.

FIX BROS. [SEAL].
By CHARLES FIX [SEAL]. 322
E. S. WALSH,

Superintendent of Public Works.

APPROVED June 16, 1919. [SEAL.]

W. J. MAIER,
Deputy State Comp.

(Co-partnership) 323

STATE OF NEW YORK, } ss.:
COUNTY OF ERIE, }

On this 6 day of June 1919, before me, the subscriber,
personally appeared CHARLES FIX, to me known and
known to me to be the individual who executed the
foregoing instrument as a member of the co-partner-
ship of Fix Bros., who, being by me duly sworn, did 324
depose and say, that he resides in Buffalo, N. Y., that
he is a member of the above named co-partnership
which is composed of himself and Frank Fix, who are
all the persons interested therein; that he executed the
foregoing instrument on behalf of the said co-partner-
ship and as a member thereof; that he was authorized
to execute the same; and he acknowledged to me that 325
he executed the same on behalf of the said co-partner-
ship for the purposes therein stated.

C. G. BABCOCK,
Notary Public,
Erie County.

326

Paper 6

STATE OF NEW YORK, }
 COUNTY OF ERIE, } ss.:
 CITY OF BUFFALO, }

327

CHARLES FIX being duly sworn, deposes and says that he is one of the claimants and respondents in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES FIX.

328

Sworn to before me this —
 day of June, 1920.

CLYDE JOSLIN,
Notary Public,
 Erie Co.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

329

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Answer with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

330

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
 [SEAL] of Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

" PAPER 7 "

331

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK—IN
ADMIRALTY.

MURRAY TRANSPORTATION COMPANY, Bailee
of United States Navy Coal Barge
No. 483,

332

*Libelant,**against*

The Steam Tug " HENRY KOERBER, JR. ",
Her Boilers, Engines, Tackle, Apparel
and Furniture,

Respondent.

333

KNOW ALL MEN BY THESE PRESENTS, that AMERICAN
SURETY COMPANY OF NEW YORK, a domestic corpora-
tion having its principal office at No. 100 Broadway,
New York, New York, and having an office at
Buffalo, New York, is held and firmly bound
unto MURRAY TRANSPORTATION COMPANY or to
EDWARD S. WALSH, Superintendent of Public
Works of the State of New York, in the sum of
Two Hundred Fifty (\$250.00) Dollars, lawful money
of the United States, to be paid to said MURRAY TRANS-
PORTATION COMPANY, its successors or assigns, or to
EDWARD S. WALSH, Superintendent of Public Works
of the State of New York, or his successors, for which
payment well and truly to be made, said AMERICAN
SURETY COMPANY OF NEW YORK, binds itself and its
successors firmly by these presents.

334

335

SEALED with its seal and dated the 1st day of June,
1920.

336

WHEREAS, a certain cause in Admiralty has been instituted in the United States District Court for the Western District of New York, by the libel of Murray Transportation Company, Bailee of United States Navy Coal Barge No. 483, against the steam tug "HENRY KOERBER, JR.," her engines, boilers, tackle, apparel and furniture, to collect damages in the sum of Three Thousand (\$3,000.00) Dollars, alleged to be due said libelant in a cause of collision, civil and maritime, and

337

WHEREAS, FRANK FIX and CHARLES FIX, doing business under the name and style of Fix Brothers, are the owners and claimants of said Steam Tug "HENRY KOERBER, JR.," and have heretofore filed bond in said Court for release of said vessel from arrest under process issued upon said libel, and

338

WHEREAS, said FRANK F. FIX and CHARLES FIX, doing business under the name and style of Fix Brothers, have heretofore filed in said Court their claim to said vessel and are now filing their answer to said libel in said Court together with their petition to bring in Edward S. Walsh, Superintendent of Public Works of the State of New York, as a party to said action under the provisions of Rule 59 of the Admiralty Rules.

339

Now, THEREFORE, the condition of this obligation is such that upon the order of said Court, upon said petition bringing into said action said Edward S. Walsh, Superintendent of Public Works of the State of New York as a party under the provisions of Rule 59 of the Admiralty Rules, and the execution of process of said Court thereon, that if said Fix Brothers, claimants, respondents and petitioners herein, shall pay to said libelant Murray Transportation Company, or said Edward S. Walsh, Superintendent of Public Works of the State of New York, brought in as a party under the provisions of Rule 59, all such costs, damages or ex-

340

Paper 7

penses as may be awarded or assessed against said
 Fix Brothers, petitioners herein, by this Court upon 341
 the final decree in the aforesaid cause, or by any Ap-
 pellate Court, then this obligation shall be void;
 otherwise to be and remain in full force and effect;
 and said AMERICAN SURETY COMPANY OF NEW YORK
 hereby consents that in case said Fix Brothers, peti-
 tioners herein, shall make default in answering the de-
 cree of this Court or of any Appellate Court in the 342
 aforesaid cause according to the obligation herein set
 forth, execution may be issued against said AMERICAN
 SURETY COMPANY OF NEW YORK therefor.

AMERICAN SURETY COMPANY OF NEW YORK,

By HERBERT L. HART,

[L. S.]

Resident Vice President.

Attest: WALTER E. SCHAEFER,

343

Resident Asst. Secretary.

STATE OF NEW YORK, }
 ERIE COUNTY, } ss.:
 CITY OF BUFFALO, }

On the 1st day of June in the year 1920 before me
 personally came Herbert L. Hart, to me known, who, 344
 being by me duly sworn, did depose and say: That he
 resides in the City of Buffalo, N. Y.; that he is the
 Resident Vice President of the AMERICAN SURETY
 COMPANY OF NEW YORK, the corporation named in and
 which executed the within instrument; that he knows
 the seal of said corporation; that the seal affixed to
 said instrument is such corporate seal, that it was so 345
 affixed by order of the Board of Directors of said cor-
 poration and that he signed his name thereto by like
 order; and that the liabilities of said Company no not
 exceed its assets as ascertained in the manner provided
 in Section 183 of Chapter 28 of the Consolidated Laws

346

Paper 7

known as the Insurance Law. And the said Herbert L. Hart further said that he is acquainted with Walter E. Schaefer and knows him to be Resident Assistant Secretary of said Company; that the signature of the said Walter E. Schaefer, subscribed to the said instrument is in the genuine handwriting of the said Walter E. Schaefer, and was subscribed by the like order of the said Board of Directors, and in the presence of him, the said Herbert L. Hart.

GRACE A. McCLANATHAN.

[NOTARIAL SEAL]

Notary Public, Erie County.

AMERICAN SURETY COMPANY OF NEW YORK.

General Offices, 100 Broadway.

348

FINANCIAL STATEMENT, DEC. 31, 1919

RESOURCES.

Real Estate,

Home Office Premises

unencumbered \$4,500,000 00

Securities at Market

349

Value:

Stocks .. \$1,129,500 00

Bonds ... 4,485,875 00

Short term

securities 83,250 00

————— \$5,698,625 00

Cash in Banks and Offices 1,222,898 44

Excise Reinsuring Fund. 120,354 58

350

Premiums in Course of

Collection 1,264,154 79

Accrued Interest and

Rents 38,413 85

Accounts Receivable 27,205 46

————— \$12,871,652 12

Paper 7

LIABILITIES.

351

| | | |
|--------------------------|-----------------|-----|
| Capital Stock | \$5,000,000 00 | |
| Surplus and undivided | | |
| Profits | 1,059,784 23 | |
| Special Reserve | 500,000 00 | |
| Reserve for Unearned | | |
| Premiums | 3,967,078 88 | 352 |
| Reserve for Outstanding | | |
| Premiums | 401,822 14 | |
| Reserve for Contingent | | |
| Claims | 1,426,199 06 | |
| Reserve for Expenses and | | |
| Taxes | 408,079 28 | |
| Reinsurance & Other Ac- | | |
| counts payable | 108,688 53 | 353 |
| | <hr/> | |
| | \$12,871,652 12 | |
| | <hr/> | |

Special Deposits required by insurance laws of various State, not considered.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 354

H. E. Ising, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act 355

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relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company

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of New York is worth more than \$5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

H. E. ISING.

Subscribed and sworn to before me
this 29th day of March, 1920.

358

W. H. BLUNLON,
Notary Public,
Nassau County.

Certificate filed in all counties
My Commission expires March 30, 1921.

AMERICAN SURETY COMPANY OF NEW YORK

359

The first meeting of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1920, at twelve o'clock noon.

" The Secretary read the report of the Nominating
360 Committees as follows:

" To the Board of Trustees,
AMERICAN SURETY COMPANY OF NEW YORK.
" Gentlemen:

" The Committee appointed by the Executive Committee of this Company, at their meeting held Tues-

Paper 7

361

day, December 2, 1919, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

" We nominate for * * * * *

| PLACE. | RESIDENT VICE PRESIDENTS | RESIDENT ASSISTANT SECRETARIES | |
|------------------------|-----------------------------|-----------------------------------|-----|
| Buffalo, N. Y. | Herbert L. Hart | Herbert L. Hart | 362 |
| | Walter E. Schaefer | Walter E. Schaefer | |
| | Walter F. Schmieding | Walter F. Schmieding | |
| | Percy G. Lapey | S. E. Blossom | |
| | George W. Spitzmiller | I. H. Werkley | |
| | | Guy C. Metcalfe | |

* * * * *

" WHEREUPON, it was

" RESOLVED, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected. 363 364

" The following resolution was adopted:

" RESOLVED, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary. 365

* * * * *

366 STATE OF NEW YORK, } ss.:
 COUNTY OF NEW YORK, }

I, M. P. COUGHLIN, Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 21st day of January, 1920.

369

M. P. COUGHLIN,
Assistant Secretary.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Bond with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

Paper 8

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And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

372

“ PAPER NO. 8 ”

UNITED STATES DISTRICT COURT — WEST-
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY.

373

WILLIAM J. DOLLOFF,
Libelant,
against

The Steam Tug “ CHARLOTTE,” Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondents.

374

KNOW ALL MEN BY THESE PRESENTS, that AMERICAN SURETY COMPANY OF NEW YORK, a domestic corporation having its principal office at No. 100 Broadway, New York, New York, and having an office at Buffalo, New York, is held and firmly bound unto WILLIAM J. DOLLOFF or to EDWARD S. WALSH, Superintendent of Public Works of the State of New York, in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States,

375

Paper 8

376

to be paid to said WILLIAM J. DOLLOFF, his heirs, executors or assigns, or to EDWARD S. WALSH, Superintendent of Public Works of the State of New York, or his successors, for which payment well and truly to be made, said AMERICAN SURETY COMPANY OF NEW YORK, binds itself and its successors firmly by these present.

377

SEALED with its seal and dated the 10th day of June, 1920.

378

WHEREAS, a certain cause in Admiralty has been instituted in the United States District Court for the Western District of New York, by the libel of WILLIAM J. DOLLOFF, against the Steam Tug "CHARLOTTE," her engines, boilers, tackle, apparel and furniture, to collect damages in the sum of Eighteen Hundred Sixty-six and 32/100 (\$1866.32) Dollars, alleged to be due said libelant in a cause of collision, civil and maritime, and

379

WHEREAS, FRANK F. FIX and CHARLES FIX, doing business under the name and style of Fix Brothers, are the owners and claimants of said Steam Tug "Charlotte," and have heretofore filed bond in said Court for release of said vessel from arrest under process issued upon said libel, and

380

WHEREAS, said FRANK F. FIX and CHARLES FIX, doing business under the name and style of Fix Brothers, have heretofore filed in said Court their claim to said vessel and are now filing their answer to said libel in said Court together with their petition to bring in EDWARD S. WALSH, Superintendent of Public Works of the State of New York, as a party to said action under the provisions of Rule 59 of the Admiralty Rules,

NOW, THEREFORE, the condition of this obligation is such that upon the order of said Court, upon said petition bringing into said action said EDWARD S. WALSH, Superintendent of Public Works of the State of New York as a party under the provisions of Rule 59 of the

Paper 8

Admiralty Rules, and the execution of process of said Court thereon, that if said Fix Brothers, claimants, respondents and petitioners herein, shall pay to said libellant William J. Dolloff, or said Edward S. Walsh, Superintendent of Public Works of the State of New York, brought in as a party under the provisions of Rule 59, all such costs, damages or expenses as may be awarded or assessed against said Fix Brothers, petitioners herein, by this Court upon the final decree in the aforesaid cause, or by any Appellate Court, then this obligation shall be void; otherwise to be and remain in full force and effect, and said AMERICAN SURETY COMPANY OF NEW YORK hereby consents that in case said Fix Brothers, petitioners herein, shall make default in answering the decree of this Court or of any Appellate Court in the aforesaid cause according to the obligation herein set forth, execution may be issued against said AMERICAN SURETY COMPANY OF NEW YORK therefor.

AMERICAN SURETY COMPANY OF NEW YORK,
By HERBERT L. HART,
Resident Vice President.

[SURETY CO. SEAL.]

Attest:

WALTER E. SCHAEFER,
Resident Asst. Secretary.

STATE OF NEW YORK, }
ERIE COUNTY, } ss.:
CITY OF BUFFALO, }

On the 10th day of June, in the year 1920, before me personally came Herbert L. Hart, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Buffalo, N. Y.; that he is the Resident Vice President of the AMERICAN SURETY COM-

Paper 8

386

PANY OF NEW YORK, the corporation named in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order; and

387

that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183 of Chapter 28 of the Consolidated Laws known as the Insurance Law. And the said Herbert L. Hart further said that he is acquainted with Walter E. Schaefer and knows him to be Resident Assistant Secretary of said Company; that the signature of the said Walter E. Schaefer subscribed to the said instrument is in the

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genuine handwriting of the said Walter E. Schaefer, and was subscribed by the like order of the said Board of Directors, and in the presence of him, the said Herbert L. Hart.

S. E. BLOSSOM,
Notary Public,
Erie County.

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AMERICAN SURETY COMPANY OF NEW YORK.
General Offices, 100 Broadway.

FINANCIAL STATEMENT, MARCH 31, 1920

RESOURCES

Real Estate:

Home Office Premises,

390 unencumbered. . . . \$4,500,000 00

Securities at Market
Value:

Stocks... \$1,061,612 50

Bonds... 4,530,424 50

Short term

securities 79,950 00

5,671,987 00

Paper 8

| | | |
|---|------------------------|-----|
| Cash in Banks and Offices | 1,928,997 35 | 391 |
| Excise Reinsuring Fund. | 105,469 03 | |
| Premiums in Course of Collection | 1,755,679 12 | |
| Accrued Interest and Rents | 82,081 63 | |
| Accounts Receivable | 25,470 69 | |
| | <u>\$14,069,684 82</u> | 392 |

LIABILITIES

| | | |
|---|------------------------|-----|
| Capital Stock | \$5,000,000 00 | |
| Surplus and Undivided Profits | 1,682,204 79 | |
| Reserve for Unearned Premiums | 4,279,390 34 | 393 |
| Reserve for Outstanding Premiums | 410,348 72 | |
| Reserve for Contingent Claims | 1,653,021 72 | |
| Reserve for Expenses and Taxes | 876,718 98 | 394 |
| Reinsurance & Other Ac- counts Payable | 168,000 27 | |
| | <u>\$14,069,684 82</u> | |

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

H. M. Goff, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said

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Paper 8

Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be
 397 accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,000,000 over and above all its debts and liabilities and such exemptions
 398 as may be allowed by law.

H. M. GOFF.

Subscribed and sworn to before me this
 17th day of May, 1920.

W. H. BENNEM,
Notary Public, Nassau County.

399 Certificate filed in all counties. Commission expires March 30, —.

[SEAL.]

AUTHORITY OF SIGNERS FOR SURETY

400 EXTRACT FROM THE RECORD BOOK OF THE BOARD OF TRUSTEES OF THE AMERICAN SURETY COMPANY OF NEW YORK

The first meeting of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1920, at twelve o'clock noon.

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" The Secretary read the report of the Nominating Committee as follows: 401

" To the Board of Trustees,

AMERICAN SURETY COMPANY OF NEW YORK.

" Gentlemen:

" The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 2, 1919, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows: 402

" We nominate for * * * * *

| PLACE. | RESIDENT | RESIDENT | 403 |
|---------------------|-----------------------|-----------------------|-----|
| | VICE PRESIDENTS | ASSISTANT SECRETARIES | |
| Buffalo, N. Y. | Herbert L. Hart | Herbert L. Hart | |
| | Walter E. Schaefer | Walter E. Schaefer | |
| | Walter F. Schmieding | Walter F. Schmieding | |
| | Percy G. Lapey | S. E. Blossom | |
| | George W. Spitzmiller | I. H. Werkley | |
| | | Guy C. Metcalfe | |

* * * * *

" WHEREUPON, it was

" RESOLVED, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected. 404 405

" The following resolution was adopted:

" RESOLVED, That the Resident Vice Presidents be and they hereby are, and each of them is hereby author-

406 ized and empowered to execute and to deliver and to
attach the seal of the Company to any and all obliga-
tions for or on behalf of the Company, such obliga-
tions, however, to be attested in every instance by a
Resident Assistant Secretary."

* * * * *

407 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, M. P. Coughlin, Assistant Secretary of the AMERI-
CAN SURETY COMPANY OF NEW YORK, do hereby certify
that I have compared the foregoing extracts and trans-
cripts, from the Record Book of the Board of Trustees
of the AMERICAN SURETY COMPANY OF NEW YORK, with
408 the original record of said Board, and that the same
are correct extracts and transcripts therefrom as they
appear of record and are set forth and contained in
said Record Book; and I further certify that I have
compared the foregoing resolutions with the originals
thereof, as recorded in the Minute Book of said Com-
pany, and do certify that the same is a correct and true
409 transcript therefrom, and of the whole of said original
resolutions; and that the said resolutions have not
been revoked or rescinded.

Given under my hand and the seal of the Com-
pany, at the City of New York, this 21st
day of January, 1920.

M. P. COUGHLIN,
Assistant Secretary.

410 [SEAL.]

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK, } ss.:

I, HARRIS S. WILLIAMS, Clerk of the District Court
of the United States for the Western District of New
York, do hereby certify that I have compared the

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annexed copy of Bond with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

411

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, this 14th day of October, A. D. 1920.

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HARRIS S. WILLIAMS,
Clerk.

“ PAPER 9 ”

413

UNITED STATES DISTRICT COURT — WEST-
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY.

GEORGE WAGNER,
Libelant,

against

414

The Steam Tug “ CHARLOTTE,” Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

KNOW ALL MEN BY THESE PRESENTS, that AMERICAN SURETY COMPANY OF NEW YORK, a domestic corporation having its principal office at No. 100 Broadway, New York, New York, and having an office at Buffalo, New York, is held and firmly bound unto GEORGE WAGNER or to EDWARD S. WALSH, Superintendent of

415

Paper 9

- 416 Public Works of the State of New York, in the sum of
Two Hundred Fifty (\$250.00) Dollars, lawful money
of the United States, to be paid to said GEORGE
WAGNER, his heirs, executors or assigns, or to EDWARD
S. WALSH, Superintendent of Public Works of the
State of New York, or his successors, for which pay-
ment well and truly to be made, said AMERICAN SURETY
417 COMPANY OF NEW YORK, binds itself and its successors
firmly by these presents.

SEALED with its seal and dated the 10th day of June,
1920.

- WHEREAS, a certain cause in Admiralty has been
instituted in the United States District Court for the
Western District of New York, by the libel of GEORGE
418 WAGNER against the Steam Tug "CHARLOTTE," her
engines, boilers, tackle, apparel and furniture, to col-
lect damages in the sum of Nine Hundred Ninety-five
(\$995.00) Dollars, alleged to be due said libelant in a
cause of collision, civil and maritime, and

- WHEREAS, FRANK F. FIX and CHARLES FIX, doing
business under the name and style of Fix Brothers,
419 are the owners and claimants of said Steam Tug
"CHARLOTTE," and have heretofore filed bond in said
Court for release of said vessel from arrest under
process issued upon said libel, and

- WHEREAS, said FRANK F. FIX and CHARLES FIX, doing
business under the name and style of Fix Brothers,
have heretofore filed in said Court their claim to said
420 vessel and are now filing their answer to said libel in
said Court together with their petition to bring in Ed-
ward S. Walsh, Superintendent of Public Works of the
State of New York, as a party to said action under the
provisions of Rule 59 of the Admiralty Rules.

NOW, THEREFORE, the condition of this obligation is
such that upon the order of said Court, upon said peti-

Paper 9

tion bringing into said action said Edward S. Walsh, 421
 Superintendent of Public Works of the State of New
 York as a party under the provisions of Rule 59 of the
 Admiralty Rules, and the execution of process of said
 Court thereon, that if said Fix Brothers, claimants,
 respondents and petitioners herein, shall pay to said
 libellant George Wagner, or said Edward S. Walsh,
 Superintendent of Public Works of the State of New 422
 York, brought in as a party under the provisions of
 Rule 59, all such costs, damages or expenses as may
 be awarded or assessed against said Fix Brothers,
 petitioners herein, by this Court upon the final decree
 in the aforesaid cause, or by any Appellate Court, then
 this obligation shall be void; otherwise to be and re-
 main in full force and effect, and said AMERICAN 423
 SURETY COMPANY OF NEW YORK hereby consents that
 in case said Fix Brothers, petitioners herein, shall
 make default in answering the decree of this Court or
 of any Appellate Court in the aforesaid cause accord-
 ing to the obligation herein set forth, execution may
 be issued against said AMERICAN SURETY COMPANY OF
 NEW YORK therefor. 424

AMERICAN SURETY COMPANY OF NEW YORK,

By HERBERT L. HART,

[L. s.]

Resident Vice President.

Attest: WALTER E. SCHAEFER,

Resident Asst. Secretary.

STATE OF NEW YORK,

ERIE COUNTY,

CITY OF BUFFALO,

} ss.:

425

On the 10th day of June in the year 1920 before me
 personally came Herbert L. Hart, to me known, who,
 being by me duly sworn, did depose and say: That he
 resides in the City of Buffalo, N. Y.; that he is the

Paper 9

- 426 Resident Vice President of the AMERICAN SURETY COMPANY OF NEW YORK, the corporation named in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like
- 427 order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183 of Chapter 28 of the Consolidated Laws known as the Insurance Law. And the said Herbert L. Hart further said that he is acquainted with Walter E. Schaefer and knows him to be Resident Assistant Secretary of said Company; that the signature of the said Walter E. Schaefer subscribed to the
- 428 said instrument is in the genuine handwriting of the said Walter E. Schaefer, and was subscribed by the like order of the said Board of Directors, and in the presence of him, the said Herbert L. Hart.

S. E. BLOSSOM,

Notary Public, Erie County

429

[L. S.]

AMERICAN SURETY COMPANY OF NEW YORK.

[Incorporated April 14, 1884]

General Offices, 100 Broadway.

Financial Statement March 31, 1920.

RESOURCES

Real Estate:

Home Office Premises, unencumbered. \$4,500,000 00

430 Securities at Market Value:

Stocks \$1,061,612 50

Bonds 4,530,424 50

Short Term Securities. 79,950 00

5,671,987 00

Cash in Banks and Offices..... 1,928,997 35

Excise Reinsuring Fund..... 105,469 03

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431

| | | |
|---------------------------------------|--------------|-----------------|
| Premiums in Course of Collection..... | 1,755,679 12 | |
| Accrued Interest and Rents..... | 82,081 63 | |
| Accounts Receivable | 25,470 60 | |
| | <hr/> | \$14,069,684 82 |

LIABILITIES

| | | |
|--|----------------|-----------------|
| Capital Stock | \$5,000,000 00 | |
| Surplus and Undivided Profits..... | 1,682,204 79 | |
| Reserve for Unearned Premiums..... | 4,279,390 34 | 432 |
| Reserve for Outstanding Premiums.... | 410,348 72 | |
| Reserve for Contingent Claims..... | 1,653,021 72 | |
| Reserve for Expenses and Taxes..... | 876,718 98 | |
| Reinsurance & Other Accounts Payable.. | 168,000 27 | |
| | <hr/> | \$14,069,684 82 |

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK, }

H. M. GOFF being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,000,000 over and

Paper 9

- 436 above all its debts and liabilities and such exemptions
as may be allowed by law.

H. M. GOFF.

Subscribed and sworn before me
this 17th day of May, 1920.

Certificate filed in all counties.

- 437 My commission expires March 30, —.

W H. BENNEM,

[SEAL]

Notary Public, Nassau County.

AUTHORITY OF SIGNERS FOR SURETY

- 438 EXTRACT FROM THE RECORD BOOK OF THE
BOARD OF TRUSTEES OF THE AMERICAN
SURETY COMPANY OF NEW YORK

The first meeting of the Board of Trustees of the
AMERICAN SURETY COMPANY OF NEW YORK, after the
annual Stockholders' meeting, was held at the office of
the Company, No. 100 Broadway, New York City, on
439 Tuesday, January 20, 1920, at twelve o'clock noon.

"The Secretary read the report of the Nominating
Committee as follows:

"To the Board of Trustees,

AMERICAN SURETY COMPANY OF NEW YORK.

"Gentlemen:

- 440 "The Committee appointed by the Executive Com-
mittee of this Company, at their meeting held Tuesday,
December 2, 1919, for the purpose of nominating * * *
Officers of the Company, * * * for the ensuing year
and until their successors are elected, beg leave to
report as follows:

Paper 9

441

“ We nominate for

| PLACE. | RESIDENT | RESIDENT |
|-------------------|-----------------------|-----------------------|
| | VICE PRESIDENTS | ASSISTANT SECRETARIES |
| Buffalo, N. Y.... | Herbert L. Hart | Herbert L. Hart |
| | Walter E. Schaefer | Walter E. Schaefer |
| | Walter F. Schmieding | Walter F. Schmieding |
| | Percy G. Lapey | S. E. Blossom |
| | George W. Spitzmiller | I. H. Werkley |
| | | Guy C. Metcalfe |

442

“ WHEREUPON, it was

“ RESOLVED, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected. 443

“ The following resolution was adopted:

“ RESOLVED, That the Resident Vice Presidents be 444 and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary.”

445

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, M. P. Coughlin, Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, do hereby certify that I have compared the foregoing extracts and trans-

Paper 9

446

cripts, from the Record Book of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

447

448

Given under my hand and the seal of the Company, at the City of New York, this 21st day of January, 1920.

M. P. COUGHLIN,
Assistant Secretary.

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

449

I, Harris S. Williams, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Bond with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

450

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A. D. 1920.

[SEAL]

HARRIS S. WILLIAMS,
Clerk.

" PAPER 10 "

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK. IN AD-
MIRALTY.

MURRAY TRANSPORTATION COMPANY, Bailee
of United States Navy Coal Barge
No. 483,

452

Respondent,
against

The Steam Tug " HENRY KOERBER, JR.,"
Her Boilers, Engines, Tackle, Apparel
and Furniture,

453

Libelant.

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE UNITED STATES DISTRICT
COURT, FOR THE WESTERN DISTRICT
OF NEW YORK:

454

The petition of Frank F. Fix and Charles Fix, doing
business under the name and style of Fix Brothers,
claimants and respondents in the above entitled action,
respectfully shows to this Honorable Court as follows:

I.

That at all the times herein mentioned petitioners
were and are co-partners doing business under the
name and style of Fix Brothers, at the City of Buffalo,
New York, and were and are the sole owners of the
Steam Tug " HENRY KOERBER, JR.," her tackle, apparel
and furniture.

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II.

That at all the times herein mentioned, the Steam Tug "HENRY KOERBER, JR.", was and is a vessel of the United States, of the burden of 84 tons, duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

457

III.

That on or about the 16th day of April, 1920, a libel in rem was filed in this Honorable Court by Murray Transportation Company, Bailee of United States Navy Coal Barge No. 483, against the said Steam Tug "HENRY KOERBER, JR.", her boilers, engines, 458 tackle, apparel and furniture, in a cause of collision, civil and maritime, to recover for damages in the sum of approximately Three Thousand (\$3,000.00) Dollars alleged to have been sustained by the Barge No. 483; that process was issued thereon and the said Steam Tug "HENRY KOERBER, JR.", was arrested under said process by the United States Marshal for the West- 459 ern District of New York; that your petitioners thereupon immediately caused said vessel to be released from arrest under such process by the filing in this Court of a surety bond in the sum of Three Thousand (\$3,000.00) Dollars; that it is claimed in said libel that the damages to said Barge No. 483 were sustained by reason of the alleged negligence of the Steam Tug 400 "HENRY KOERBER, JR.", and those in charge thereof, in the month of October, 1919, while proceeding easterly along the Erie Canal towing said Barge No. 483, in company with another barge, by the bow of said Barge No. 483 being allowed to come into collision with the canal wall or bank at a point between Lock

No. 4 and Lock No. 3. For a more particular statement of the various allegations contained in the libel, your petitioners beg leave to refer to the original libel filed herein. 461

IV.

That your petitioners have, at the time of the filing of this petition, filed herein their answer to said libel. For a more particular statement with reference to the various allegations and denials set forth in said answer herein, your petitioners beg leave to refer to the original answer filed herein, the allegations of which are incorporated herein by reference with the same force and effect as though set forth herein in full. 462

V.

That it appears by the said answer, that Edward S. Walsh, Superintendent of Public Works of the State of New York, by virtue of authority reposed in him by an Act of the Legislature of the State of New York, being Chapter 264 of the laws of 1919, entitled: "An Act to authorize the Superintendent of Public Works to provide towing facilities on the State canals, and making an appropriation therefor", heretofore and on the 16th day of May, 1919, made and entered into a charter party with your petitioners, under and by the terms of which charter party your petitioners chartered and let to the said Superintendent of Public Works, and the said Superintendent hired from petitioners for the term beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as might thereafter be determined by said Superintendent, the tug boat "HENRY KOEBER, JR.", for which said charter and use the said Superintendent 463 464 465

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agreed to pay to petitioners the sum of Twenty (\$20.00) Dollars per day, together with all moneys actually paid by petitioners for wages to the crews of said tug; that it was therein further provided that the said Superintendent should operate said vessel in such manner and in such waters as he should direct, that the crews thereon should be acceptable to said Superintendent and subject to dismissal upon the orders of said Superintendent, and that said Superintendent would furnish all fuel and supplies necessary for the operation of said tug. For a more particular statement of the covenants contained in said charter party, petitioner beg leave to refer to the copy thereof attached to and made a part of the original answer filed herein.

VI.

469

470

That upon the enactment of said statute aforesaid, the People of the State of New York, acting through said Edward S. Walsh, Superintendent of Public Works, entered into the business of towing private carriers upon the waters of the canals of the State of New York, for profit in the same manner as any private person or corporation carrying on a like business; that said Superintendent of Public Works, immediately upon the execution of said charter party as aforesaid, assumed direction, management and control of said Tug "HENRY KOERBER, JR.", as provided for in said charter party; that said Tug "HENRY KOERBER, JR.", was thereafter and down to the time of said alleged disaster to the Barge No. 483, employed by said Superintendent in towing barges and other craft upon the Erie Canal and its tributary waters, and that during all of said period during the season of 1919, and at the time of this alleged disaster to the

Barge No. 483, said Tug "HENRY KOERBER, JR.", was operated, controlled, directed and managed by the Superintendent of Public Works, by virtue of the provisions of said charter party.

VII.

Your petitioners further allege, upon information and belief, without in any way waiving any of the defenses set forth in said answer and insisting on each and every defense therein set forth, that in the event that this court should find upon the trial of this action that said Steam Tug "HENRY KOERBER, JR.", or those in charge of her were negligent in the management of said Barge No. 483, and as a result should respond to libellant for the damages sustained, and this Court should thereupon order a decree in favor of libellant and against said Steam Tug "HENRY KOERBER, JR.", her boilers, engines, tackle, apparel and furniture, for the amount thereof, or a decree for a division of the damages thereon, your petitioners would become liable for the payment of all or a portion of the damages to the Barge No. 483 under the pleadings as now framed, and would be thereby forced to pay the amount thereof as found, and as a result would be mulcted in damages for a disaster to which they were total strangers and wholly innocent, and concerning which they had no control, direction or participation; that by reason of the matters and things set forth in the original answer filed herein, Edward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in this same action, so that in the event that said vessel is held liable for all or a portion of the alleged damages the loss therefor may not fall upon your petitioners.

VIII.

That as your petitioners are informed and believe, in the event that a decree is entered herein for all or a portion of the damages claimed by libelant against said Steam Tug "HENRY KOERBER, JR.", her boilers, engines, tackle, apparel and furniture, and your petitioners are obliged to pay the whole amount awarded; that by operation of law it will be impossible for your petitioners to recoup their loss thereon against said Superintendent of Public Works or the People of the State of New York by appropriate action therefor, and that as a result thereof your petitioners would be made liable for and compelled to sustain a very considerable pecuniary loss for damages for which they are in no way liable and toward which they did not contribute by any act or omission whatsoever upon their part.

IX.

That as your petitioners are informed and believe, said Superintendent of Public Works is represented by a deputy resident within the Western District of New York and that there is various property of the State of New York used and controlled by said Superintendent of Public Works located within the Western District of New York.

X.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

WHEREFORE, your petitioners pray that process in due form of law according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction and as provided by the Admiralty Rules of this Court may issue against said

Edward S. Walsh, Superintendent of Public Works of the State of New York, citing him to appear and answer on oath all and singular the matters aforesaid, and in case he cannot be found, then that the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for; and that on the final hearing, if there be a decree in favor of libellant's claim for damages in whole or in part, this Honorable Court will pronounce in favor of your petitioners' claim, and that this Honorable Court will hold the said Superintendent of Public Works of the State of New York liable for the said collision, and the damages and costs resultant therefrom, if any, and will decree the payment of the same, if any, by said Superintendent of Public Works, and for such other and further relief as your petitioners may be entitled to in the premises which to law and justice may appertain.

FIX BROTHERS,

By CHARLES FIX,

Respondents and Petitioners.

STANLEY & GIDLEY,

Proctors for Resp. and Petitioners,

1025 Marine Trust Co. Bldg.,

Buffalo, N. Y.

STATE OF NEW YORK, }

COUNTY OF ERIE, }

WESTERN DISTRICT OF N. Y. }

ss.:

Charles Fix, being duly sworn, deposes and says that he is one of the respondents in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to

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486

be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES FIX.

Sworn to before me this 7th
day of June, 1920.

CLYDE JOSLIN,
Notary Public.

487

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK, } *ss.:*

488

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Petition with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

489

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A. D., 1920.

HARRIS S. WILLIAMS,
Clerk.

490

"PAPER 11."

491

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK—IN
ADMIRALTY.

WILLIAM J. DOLLOFF,
Libelant,
against

492

The Steam Tug "CHARLOTTE," her En-
gines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture.
Respondent.

493

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF NEW
YORK:

The Petition of FRANK F. FIX and CHARLES FIX, doing
business under the name and style of Fix Brothers,
claimants and respondents in the above-entitled action,
respectfully shows to this Honorable Court as follows:

494

I.

That at all times herein mentioned petitioners were
and are co-partners doing business under the name
and style of Fix Brothers, at the City of Buffalo, New
York, and were and are the sole owners of the Steam
Tug "CHARLOTTE," her engines, boilers, machinery,
boats, tackle, apparel and furniture.

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II.

That at all the times herein mentioned the Steam
Tug "CHARLOTTE" was and is a vessel of the United

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States, of the burden of 39 tons, duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

III.

497

That on or about the 5th day of February, 1920, a libel *in rem* was filed in this Honorable Court by William J. Dolloff, against said Steam Tug "CHARLOTTE," her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of collision, civil and maritime to recover for damages in the sum of eighteen hundred and sixty six and 32/100 (\$1866.32) dollars, with interest, alleged to have been sustained by libellant's canal boats "Joseph Weed" and "Romaine."

498

That process was issued thereon; that your petitioners thereupon immediately stipulated that if said vessel be not placed under arrest, your petitioners would procure and file in this Court a surety bond in the sum of twenty-six hundred (\$2,600.00) dollars as security for said vessel and that your petitioners filed such bond,

499

together with their claim for said vessel, and thereupon caused said vessel to be released from arrest under said process, on the 9th day of February, 1920; that it is claimed in said libel that the damages to said canal boats "Joseph Weed" and "Romaine" were sustained by reason of the alleged negligence of the Tug "CHARLOTTE" and those in charge thereof, on or about

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the 7th day of July, 1919, while proceeding westward along the Erie canal, towing said canal boats "Joseph Weed" and "Romaine" in company with three other canal boats by one of the said canal boats being allowed to come into collision with the canal wall or abutment at a point adjacent to the guard-lock about three miles east of Little Falls, New York. For a more particular

statement of the various allegations contained in the libel, your petitioners beg leave to refer to original libel filed herein.

IV.

That your petitioners have, at the time of filing this petition, filed their answer to said libel. For a more particular statement with reference to the various allegations and denials set forth in said answer herein, petitioners beg leave to refer to the original answer filed herein, the allegations of which are incorporated herein by reference with the same force and effect as though set forth herein in full. 502

V.

That it appears by the said answer that Edward S. Walsh, Superintendent of Public Works of the State of New York, by virtue of the authority reposed in him by an act of the Legislature of the State of New York, being chapter 264 of the Laws of 1919, entitled "An act to authorize the Superintendent of Public Works to provide towing facilities on the state canals and making an appropriation therefor," heretofore and on the 16th day of May, 1919, made and entered into a charter party with petitioners, under and by virtue of the terms of said charter, your petitioners chartered and let to the said Superintendent of Public Works, and the said Superintendent of Public Works hired from petitioners, for the term beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as might be determined by said Superintendent of Public Works, the tug boat "Charlotte" for which said charter and use the said Superintendent agreed to pay to petitioners the sum of 504 505

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Paper 11

507

twenty (\$20.00) dollars per day, together with all moneys actually paid by petitioners for wages to the crews of said tug; that it was therein further provided that said Superintendent should operate said vessel in such manner and in such waters as he should direct, that the crews thereon should be acceptable to said Superintendent and subject to dismissal upon the orders of said Superintendent, and that the said Superintendent would furnish all fuel and supplies necessary for the operation of said tug. For a more particular statement of the covenants contained in said charter party, petitioners beg leave to refer to copy thereof attached to and made a part of the original answer filed herein.

508

VI.

509

510

That upon the enactment of said statute aforesaid, the People of the State of New York, acting through said Edward S. Walsh, Superintendent of Public Works, entered into the business of towing private carriers upon the waters of the canals of the State of New York for profit, in the same manner as any private person or corporation carrying on a like business; that said Superintendent of Public Works immediately upon the execution of said charter party, as aforesaid, assumed direction, management and control of said tug "Charlotte" as provided for in said charter party; that said tug "Charlotte" was thereafter and down to the time of said alleged disaster to canal boats "Joseph Weed" and "Romayne," employed by said Superintendent in towing barges and other craft upon the Erie canal and its tributary waters, and that during all of said period during the season of 1919, and at the time of this alleged disaster to libellant's canal boats, said tug "Charlotte" was

Paper 11

operated, controlled, directed and managed by the 511
 Superintendent of Public Works, by virtue of the provisions of said charter party.

VII.

Your petitioners further allege, upon information and belief, without in any way waiving any defense set forth in said answer and insisting on each and every 512
 defense therein set forth, that in the event that this Court should find upon the trial of this action that said steam tug "Charlotte" or those in charge of her were negligent in the management of said libelant's canal boats "Joseph Weed" and "Romaine," and as a result should respond to libelant for the damages sustained, and this Court should thereupon order a 513
 decree in favor of libelant and against said steam tug "Charlotte" her engines, boilers, machinery, boats, tackle, apparel and furniture, for the amount thereof, or a decree for the division of the damages thereon, your petitioners would become liable for the payment of all or a portion of the damages to said canal boats under the pleadings as now framed, and would be thereby forced to pay the amount thereof as found, 514
 and as a result would be mulcted in damages for a disaster to which they were total strangers and wholly innocent of, and concerning which they had no control, direction or participation; that by reason of the matters and things set forth in the original answer filed herein, Edward S. Walsh, Superintendent of Public Works of the State of New York, ought to be 515
 proceeded against in this same action, so that in the event that said vessel is held liable for all or a portion of the alleged damages, the loss therefor may not fall upon your petitioners.

VIII.

That as your petitioners are informed and believe, in the event that a decree is entered herein for all or a portion of the damages claimed by libellant against said steam tug "Charlotte" her engines, boilers, machinery, boats, tackle, apparel and furniture, and
517 your petitioners are obliged to pay the whole amount awarded, that by operation of the law it will be impossible for your petitioners to recoup their loss thereon against said Superintendent of Public Works or the People of the State of New York by appropriate action therefor, and that as a result thereof your petitioners would be made liable for and compelled to
518 sustain a heavy pecuniary loss for damages for which they are in no way liable and toward which they did not contribute by any act or omission whatsoever upon their part.

IX.

That as your petitioners are informed and believe, said Superintendent of Public Works is represented
519 by a deputy resident within the Western District of New York, and that there is various property of the State of New York used and controlled by said Superintendent of Public Works located within the Western District of New York.

X.

That all and singular the premises are true and
520 within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, Your petitioners pray that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, and as provided by the admir-

Paper 11

alty rules of this Court, shall issue against said ⁵²¹
 Edward S. Walsh, Superintendent of Public Works
 of the State of New York, citing him to appear and
 answer on oath, all and singular, the matters afore-
 said, and in case he cannot be found, then that the
 goods and chattels of the State of New York used and
 controlled by him be attached to the amount sued for,
 and that on the final hearing, if there be a decree in ⁵²²
 favor of libellant's claim for damages in whole or in
 part, this Honorable Court will pronounce in favor of
 your petitioners, and that it will hold the Superintend-
 ent of Public Works of the State of New York liable
 for the said collision and the damages and costs re-
 sultant therefrom, if any, and will decree the payment
 of same, if any, by said Superintendent of Public ⁵²³
 Works, and for such other and further relief as your
 petitioners may be entitled to in the premises which
 to law and justice may appertain.

FIX BROTHERS.

By CHARLES FIX,
Petitioners and Respondents.

STANLEY & GIDLEY,

⁵²⁴

Proctors for Resp. and Petitioners,

1025 Marine Trust Co. Bldg., Buffalo, N. Y.

STATE OF NEW YORK, }
 COUNTY OF ERIE, } ss.:
 CITY OF BUFFALO, }

Charles Fix, being duly sworn, deposes and says ⁵²⁵
 that he is one of the petitioners in this action; that
 he has read the foregoing Petition and knows the
 contents thereof; that the same is true to the knowledge
 of deponent, except as to the matters therein stated

526

Paper 11

to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES FIX.

Sworn to before me this
day of June, 1920.

CLYDE JOSLIN,

527

Notary Public,
Erie Co.

UNITED STATES OF AMERICA } ss.:
WESTERN DISTRICT OF NEW YORK.

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New
528 York, do hereby certify that I have compared the annexed copy of Petition with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

529

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of
[SEAL] Buffalo, in said District, this 14th day of October, A. D., 1920.

HARRIS S. WILLIAMS,

Clerk.

530

" PAPER 12 "

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK—IN AD-
MIRALTY.

GEORGE WAGNER,

532

Libelant.

against

The Steam Tug " CHARLOTTE," Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,

533

Respondent.

TO THE HONORABLE JOHN R. HAZEL, JUDGE
OF THE UNITED STATES DISTRICT
COURT, FOR THE WESTERN DISTRICT
OF NEW YORK:

534

The petition of Frank F. Fix and Charles Fix, doing
business under the name and style of Fix Brothers,
claimants and respondents in the above-entitled action,
respectfully shows to this Honorable Court as follows:

I.

That at all the times herein mentioned petitioners 535
were and are co-partners doing business under the
name and style of Fix Brothers, at the City of
Buffalo, New York, and were and are the sole owners
of the steam tug " Charlotte," her engines, boilers,
machinery, boats, tackle, apparel and furniture.

II.

That at all the times herein mentioned the steam tug "Charlotte" was and is a vessel of the United States, of the burden of 39 tons, duly enrolled and licensed for the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

III.

That on or about the 5th day of February, 1920, a libel *in rem* was filed in this Honorable Court, by George Wagner, against said steam tug "Charlotte," her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of collision, civil and maritime, to recover for damages in the sum of nine hundred ninety-five and 00/100 (\$995.00) dollars, with interest, alleged to have been sustained by libelant's canal boat "John Monk." That process was issued thereon; that your petitioners thereupon immediately stipulated that if said vessel be not placed under arrest, your petitioners would procure and file in this Court a surety bond in the sum of fifteen hundred (\$1,500) dollars as security for said vessel, and that your petitioners filed such bond, together with their claim for said vessel, and thereupon caused said vessel to be released from arrest under said process, on the 9th day of February, 1920; that it is claimed in said libel that the damages to said canal boat "John Monk" were sustained by reason of the alleged negligence of the tug "Charlotte" and those in charge thereof, on or about the 7th day of July, 1919, while proceeding westward along the Erie canal, towing said canal boat "John Monk," in company with four other canal boats by one of the said canal boats being allowed to come into collision with the canal wall or

abutment at a point adjacent to the guard-lock about three miles east of Little Falls, New York. For a more particular statement of the various allegations contained in the libel, your petitioners beg leave to refer to original libel filed herein.

IV.

That your petitioners have, at the time of filing this petition, filed their answer to said libel. For a more particular statement with reference to the various allegations and denials set forth in said answer herein, petitioners beg leave to refer to the original answer filed herein, the allegations of which are incorporated herein by reference with the same force and effect as though set forth herein in full. 543

V.

That it appears by the said answer that Edward S. Walsh, Superintendent of Public Works of the State of New York, by virtue of the authority reposed in him by an act of the Legislature of the State of New York, being chapter 264 of the Laws of 1919, entitled: "An act to authorize the Superintendent of Public Works to provide towing facilities on the state canals and making an appropriation therefor," heretofore and on the 16th day of May, 1919, made and entered into a charter party with petitioners, under and by virtue of the terms of said charter, your petitioners chartered and let to the said Superintendent of Public Works, and the said Superintendent of Public Works hired from petitioners, for the term beginning the 15th day of May, 1919, and ending at such date between the 15th day of November, 1919, and the 15th day of December, 1919, as might be determined by 544 545

546

said Superintendent of Public Works, the tug boat "Charlotte," for which said charter and use the said Superintendent agreed to pay to petitioners the sum of twenty (\$20.00) dollars per day, together with all moneys actually paid by petitioners for wages to the crews of said tugs; that it was therein further provided that said Superintendent should operate said vessel in such manner and in such waters as he should direct, that the crews thereon should be acceptable to said Superintendent and subject to dismissal upon the orders of said Superintendent, and that the said Superintendent would furnish all fuel and supplies necessary for the operation of said tug. For a more particular statement of the covenants contained in said charter party, petitioners beg leave to refer to copy thereof attached to and made a part of the original answer filed herein.

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VI.

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That upon the enactment of said statute aforesaid, the People of the State of New York, acting through said Edward S. Walsh, Superintendent of Public Works, entered into the business of towing private carriers upon the waters of the canals of the State of New York for profit, in the same manner as any private person or corporation carrying on a like business; that said Superintendent of Public Works immediately upon the execution of said charter party, as aforesaid, assumed direction, management and control of said tug "Charlotte" as provided for in said charter party; that said tug "Charlotte" was, thereafter and down to the time of said alleged disaster to canal boat "John Monk," employed by said Superintendent in towing barges and other craft upon the Erie canal and its tributary waters, and that during

all of said period during the season of 1919, and at the time of this alleged disaster to libelant's canal boat, said tug "Charlotte" was operated, controlled, directed and managed by the Superintendent of Public Works, by virtue of the provisions of said charter party.

VII.

Your petitioners further allege, upon information and belief, without in any way waiving any defense set forth in said answer and insisting on each and every defense therein set forth, that in the event that this Court should find upon the trial of this action that said steam tug "Charlotte" or those in charge of her, were negligent in the management of said libelant's canal boat "John Monk," and as a result should respond to libelant for the damages sustained, and this Court should thereupon order a decree in favor of libelant and against said steam tug "Charlotte" her engines, boilers, machinery, boats, tackle, apparel and furniture, for the amount thereof, or a decree for the division of the damages thereon, your petitioners would become liable for the payment of all or a portion of the damages to said canal boat under the pleadings as now framed, and would be thereby forced to pay the amount thereof as found, and as a result would be mulcted in damages for a disaster to which they were total strangers and wholly innocent of, and concerning which they had no control, direction or participation; that by reason of the matters and things set forth in the original answer filed herein, Edward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in this same action, so that in the event that said vessel is held liable for all or a portion of the

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Paper 12

alleged damages, the loss therefor may not fall upon your petitioners.

VIII.

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That as your petitioners are informed and believe in the event that a decree is entered herein for all or a portion of the damages claimed by libellant against said steam tug "Charlotte," her engines, boilers, machinery, boats, tackle, apparel and furniture, and your petitioners are obliged to pay the whole amount awarded, that by operation of the law it will be impossible for your petitioners to recoup their loss thereon against said Superintendent of Public Works or the People of the State of New York by appropriate action therefor, and that as a result thereof your petitioners would be made liable for and compelled to sustain a heavy considerable pecuniary loss for damages for which they are in no way liable and toward which they did not contribute by any act or omission whatsoever upon their part.

IX.

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That as your petitioners are informed and believe, said Superintendent of Public Works is represented by a Deputy resident within the Western District of New York, and that there is various property of the State of New York used and controlled by said Superintendent of Public Works located within the Western District of New York.

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X.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, Your petitioners pray that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and

Paper 12

maritime jurisdiction, and as provided by the admiralty rules of this Court, shall issue against said Edward S. Walsh, Superintendent of Public Works of the State of New York, citing him to appear and answer on oath, all and singular, the matters aforesaid, and in case he cannot be found, then that the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for, and that on the final hearing, if there be a decree in favor of libellant's claim for damages in whole or in part, this Honorable Court will pronounce in favor of your petitioners, and that it will hold the Superintendent of Public Works of the State of New York liable for the said collision and the damages and costs resultant therefrom, if any, and will decree the payment of same if any, by said Superintendent of Public Works, and for such other and further relief as your petitioners may be entitled to in the premises which to law and justice may appertain

FIX BROTHERS,

By CHARLES FIX,

Petitioners and Respondents.

STANLEY & GIDLEY,

Proctors for Resp. and Petitioners,

1025 Marine Trust Co. Bldg., Buffalo, N. Y.

STATE OF NEW YORK, }
 COUNTY OF ERIE, } ss.:
 CITY OF BUFFALO. }

565

Charles Fix, being duly sworn, deposes and says that he is one of the petitioners in this action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to the knowledge

Paper 18

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of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES FIX.

Sworn to before me this
day of June, 1920.

567

CLYDE JOSLIN,
Notary Public,
Erie Co.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.:

568

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the the annexed copy of Petition with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

569

IN TESTIMONY WHEREOF, I have caused the seal
of the said Court to be affixed at the City of
[SEAL] Buffalo, in said District, this 14th day of
October, A. D. 1920.

HARRIS S. WILLIAMS,

Clerk.

570

" PAPER 13 "

At a Term of the United States District
Court held in and for the Western Dis-
trict of New York, at the Federal Build-
ing, in the City of Rochester, New York,
on the 8th day of June, 1920.

572

Present:

HON. JOHN R. HAZEL,
District Judge.

MURRAY TRANSPORTATION COMPANY, Bailees
of the United States Navy Coal Barge
No. 483,

Libelant,

573

against

The Steam Tug " HENRY KOERBER, JR. ",
Her Boilers, Engines, Tackle, Apparel
and Furniture,

Respondent.

574

A libel having been heretofore and on the 16th day
of April, 1920, filed herein against the Steam Tug
" HENRY KOERBER, JR. ", her boilers, engines, tackle,
apparel and furniture in a cause of collision, civil and
maritime, and Frank F. Fix and Charles Fix having
appeared in said action and filed a claim of ownership
to said Steam Tug; and the said Frank F. Fix and
Charles Fix having heretofore and on the 7th day of
June, 1920, filed their answer to said libel, and at the
same time having filed a verified petition herein, by
which it appears that the said Steam Tug, " HENRY
KOERBER, JR. ", at the time of the happening of the mat-

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ters and things contained in said libel, was under charter to Edward S. Walsh, Superintendent of Public Works of the State of New York, and that said Steam Tug at all said times was under the exclusive dominion and control of the said Edward S. Walsh, his officers, agents and servants; and it further appearing by said

577

petition that the said Edward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in this action, so that in the event that said vessel is held liable for all or a portion of the damages alleged in said libel, the loss therefor may not fall upon the petitioners; and it further appearing that the petitioners herein having duly filed

578

a stipulation with sufficient sureties to pay to the libellant or to any claimant or any party brought in by virtue of any process issued upon said petition all such costs, damages and expenses as shall be awarded against the petitioners by the Court upon the final decree ordered rendered in the original Appellate Court,

579

Now, THEREFORE, on motion of Ray M. Stanley, one of the Proctors for the Respondents in the above action, it is hereby

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ORDERED, That process in due form of law according to the course and practice of this Court in causes of admiralty and maritime jurisdiction and as provided by Admiralty Rule No 59 of this Court, issue against said Edward S. Walsh, Superintendent of Public Works of the State of New York, citing him to appear and answer on oath all and singular the matters contained in said petition and the libel filed herein; and in case he cannot be found, then that the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for.

JOHN R. HAZEL,
D. J.

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Order that Process Issue against Edward S. Walsh, Supt. of Public Works, with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

582

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, this 14th day of October, A. D., 1920.

583

HARRIS S. WILLIAMS,
Clerk.

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" PAPER 14 "

At a Term of the United States District Court held in and for the Western District of New York, at the Federal Building, in the City of Rochester, New York, on the 12th day of June, 1920.

587 Present:

Hon. JOHN R. HAZEL,
District Judge.

UNITED STATES DISTRICT COURT — WEST-
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY:

588

WILLIAM J. DOLLOFF,
Libelant,
against

The Steam Tug " CHARLOTTE ", Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

589

A libel having been heretofore and on the 5th day of February, 1920, filed herein against the Steam Tug " CHARLOTTE ", her engines, boilers, machinery, boats, tackle, apparel and furniture in a cause of collision, civil and maritime, and Frank F. Fix and Charles Fix, having appeared in said action and filed a claim of ownership to said Steam Tug, and the said Frank F. Fix and Charles Fix having heretofore and on the 12th day of June, 1920, filed their answer to said libel, and at the same time having filed a verified petition

590

Paper 14

herein, by which it appears that the said Steam Tug
 " CHARLOTTE " at the time of the happening of the
 matters and things contained in said libel, was under
 charter to Edward S. Walsh, Superintendent of Pub-
 lic Works of the State of New York, and that said
 Steam Tug at all said times was under the exclusive
 dominion and control of the said Edward S. Walsh,
 his officers, agents and servants, and it further appear-
 ing by said petition that the said Edward S. Walsh,
 Superintendent of Public Works of the State of New
 York, ought to be proceeded against in this action, so
 that in the event that said vessel is held liable for all or
 a portion of the damages alleged in said libel, the loss
 therefor may not fall upon the petitioners; and it fur-
 ther appearing that the petitioners herein having duly
 filed a stipulation with sufficient sureties to pay to the
 libelant or to any claimant or any party brought in
 by virtue of any process issued upon said petition all
 such costs, damages and expenses as shall be awarded
 against the petitioners by the Court upon the final
 decree ordered rendered in the original or Appellate
 Court,

Now, THEREFORE, on motion of Ray M. Stanley, one
 of the Proctors for the Respondents in the above
 action, it is hereby

ORDERED, That process in due form of law according
 to the course and practice of this Court in causes of
 admiralty and maritime jurisdiction and as provided
 by Admiralty Rule No. 59 of this Court, issue against
 said Edward S. Walsh, Superintendent of Public
 Works of the State of New York, citing him to appear
 and answer on oath all and singular the matters con-
 tained in said petition and the libel filed herein; and

Paper 14

596 in case he cannot be found, then that the goods and
chattels of the State of New York used and controlled
by him be attached to the amount sued for.

JOHN R. HAZEL,
D. J.

UNITED STATES OF AMERICA, }
597 WESTERN DISTRICT OF NEW YORK, } ss.:

I, HARRIS S. WILLIAMS, Clerk of the District Court
of the United States for the Western District of New
York, do hereby certify that I have compared the
annexed copy of Order that Process Issue against
Edward S. Walsh, Supt. of Public Works, with the
Original entered and on file in this office, and that the
598 same is a correct transcript therefrom, and of the
whole of said Original.

And I further certify that I am the officer in whose
custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal
of the said Court to be affixed at the City
[L. S.] of Buffalo, in said District, this 14th day of
599 October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

" PAPER 15 "

At a Term of the United States District Court held in and for the Western District of New York, at the Federal Building, in the City of Rochester, New York, on the 12th day of June, 1920.

602

Present:

Hon. JOHN R. HAZEL,
District Judge.

UNITED STATES DISTRICT COURT — WEST-
ERN DISTRICT OF NEW YORK — IN
ADMIRALTY:

603

GEORGE WAGNER,
Libellant,

against

The Steam Tug " CHARLOTTE ", Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

604

A libel having been heretofore and on the 5th day of February, 1920, filed herein against the Steam Tug " CHARLOTTE ", her engines, boilers, machinery, boats, tackle, apparel and furniture in a cause of collision, civil and maritime, and FRANK F. FIX and CHARLES FIX having appeared in said action and filed a claim of ownership to said Steam Tug, and the said Frank F. Fix and Charles Fix having heretofore and on the 12th day of June, 1920, filed their answer to said libel, and at the same time having filed a verified petition herein, by which it appears that the said Steam Tug " CHARLOTTE," at the time of the happening of

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606 the matters and things contained in said libel, was
under charter to Edward S. Walsh, Superintendent of
Public Works of the State of New York, and that said
Steam Tug at all said times was under the exclusive
dominion and control of the said Edward S. Walsh, his
officers, agents and servants; and it further appearing
by said petition that the said Edward S. Walsh, Super-
607 intendent of Public Works of the State of New York,
ought to be proceeded against in this action, so that
in the event that said vessel is held liable for all or
a portion of the damages alleged in said libel the loss
therefor may not fall upon the petitioners; and it fur-
ther appearing that the petitioners herein having duly
filed a stipulation with sufficient sureties to pay to the
608 libelant or to any claimant or any party brought in by
virtue of any process issued upon said petition all such
costs, damages and expenses as shall be awarded
against the petitioners by the Court upon the final
decree ordered rendered in the original or Appellate
Court,

Now, THEREFORE, on motion of Ray M. Stanley, one
609 of the Proctors for the Respondents in the above
action, it is hereby

ORDERED, That process in due form of law according
to the course and practice of this Court in causes of
admiralty and maritime jurisdiction and as provided
by Admiralty Rule No. 59 of this Court, issue against
said Edward S. Walsh, Superintendent of Public
610 Works of the State of New York, citing him to appear
and answer on oath all and singular the matters con-
tained in said petition and the libel filed herein; and
in case he cannot be found, then that the goods and
chattels of the State of New York used and controlled
by him be attached to the amount sued for.

JOHN R. HAZEL,

D. J.

Paper 16

611

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Order that Process Issue against Edward S. Walsh, Supt. of Public Works, with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 612

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City [L. s.] of Buffalo, in said District, this 14th day of October, A. D. 1920. 613

HARRIS S. WILLIAMS,
Clerk.

PAPER "16"

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

614

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE WESTERN DISTRICT OF NEW YORK, AND TO HIS DEPUTY, WHOMSOEVER.

GREETING:

WHEREAS, a Petition of Frank F. Fix and Charles Fix, doing business under the name and style of Fix Brothers, hath been filed in the District Court of the United States, for the Western District of New York, on the 8th day of June, one thousand nine hundred and twenty in an action entitled Murray Transportation Company, Bailee of the United States Navy Coal 615

Paper 16

616 Barge No. 483 against the steam tug "Henry Koerber, Jr.", her boilers, engines, tackle, apparel and furniture, respondent, and praying that a monition issue against Edward S. Walsh, Superintendent of Public Works of the State of New York, pursuant to the rules and practice of this Court.

Now, THEREFORE, you are hereby jointly and sever-
 617 ally empowered, and strictly enjoined and commanded, that you admonish and cite, peremptorily, the said Edward S. Walsh, Superintendent of Public Works of the State of New York, if he shall be found within your district, to appear before the Judge of the District Court of the United States of America, for the Western District of New York, at the City of Buffalo, N. Y., on the 29th day of June, 1920, if it be a Court
 618 day, or else on the Court day next following, at ten o'clock in the forenoon, there to answer unto the Petition of Frank Fix and Charles Fix doing business under the name and style of Fix Brothers in a cause collision, civil and maritime.

And further to do and receive in this behalf, as to justice shall appertain; and that you duly certify the
 619 Judge of the aforesaid Court what you shall do in the premises, together with these presents.

WITNESS, The Honorable John R. Hazel, Judge of the aforesaid Court, at the City of Rochester, N. Y., this 10th day of June in the year of our Lord one thousand nine hundred and twenty.

Action for \$3,000.00 and costs, \$100.

620

MAY C. SICKMON,
Chief Deputy Clerk.

MESSRS. STANLEY & GIDLEY,

Proctors for Petitioners,

Marine Nat'l Bank Bldg., Buffalo, N. Y.

[SEAL]

Received, June 10, 1920, U. S. Marshal, Buffalo.

MARSHAL'S RETURN.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I HEREBY CERTIFY, That on the 19th day of July, 1920, at Buffalo, N. Y., in obedience to the within writ, I did personally serve a copy of the within Warrant of Monition on the within named defendant, Edward S. Walsh, Supt. of Public Works of the State of New York, by showing to him the original warrant and delivering to and leaving with Edward S. Walsh, a true copy thereof. 622

JOHN D. LYNN,
 U. S. Marshal.

By FRANK H. RINE, 623
Field Deputy.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK. }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Warrant of Monition (*In Personam*) with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 624

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of [SEAL] Buffalo, in said District, this 14th day of October, A D. 1920. 625

HARRIS S. WILLIAMS,
Clerk.

626

" PAPER 17 "

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

627

THE PRESIDENT OF THE UNITED STATES OF
 AMERICA TO THE MARSHAL OF THE
 WESTERN DISTRICT OF NEW YORK, AND
 TO HIS DEPUTY, WHOMSOEVER.

GREETING:

WHEREAS, a Petition hath been filed in the District
 Court of the United States, for the Western District
 of New York, on the 12th day of June, one thousand
 nine hundred and twenty, by Frank F. Fix and Charles
 628 Fix, doing business under the name and style of Fix
 Brothers in an action entitled Willim J. Dolloff, Li-
 belant, against the steam tug " CHARLOTTE," her en-
 gines, boilers, machinery, boats, tackle, apparel and
 furniture, respondent, and praying that a monition
 issue against Edward S. Walsh, Supt. of Public Works
 of the State of New York, pursuant to the rules and
 629 practice of this Court;

Now, THEREFORE, you are hereby jointly and sev-
 erally empowered, and strictly enjoined and com-
 manded, that you admonish and cite, peremptorily,
 the said Edward S. Walsh, Supt. of Public Works of
 the State of New York, if he shall be found within
 your district, to appear before the Judge of the Dis-
 trict Court of the United States of America, for the
 630 Western District of New York, at the City of Buffalo,
 N. Y., on the 6th day of July, 1920, if it be a Court
 day, or else on the Court day next following, at ten
 o'clock in the forenoon, there to answer unto the Peti-
 tion and Libel filed herein in a cause, collision, civil
 and maritime.

Paper 17

And further to do and receive in this behalf, as to justice shall appertain; and that you duly certify the Judge of the aforesaid Court what you shall do in the premises, together with these presents.

WITNESS, The Honorable John R. Hazel, Judge of the aforesaid Court, at the City of Rochester, N. Y., this 14th day of June, in the year of our Lord one thousand nine hundred and twenty. 632

Action for \$1,866.32 and costs, \$100.

MAY C. SICKMON,
Chief Deputy Clerk.

[SEAL.]

MESSRS. STANLEY & GIDLEY,
Proctors for Libelant. 633
Marine National Bank Building,
Buffalo, N. Y.

MARSHAL'S RETURN.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK. ss.: 634

I hereby certify, That on the 19th day of July, 1920, at Buffalo, N. Y., in obedience to the within writ, I did personally serve a copy of the within warrant of Monition on the within named defendant Edward S. Walsh, Supt. of Public Works of the State of New York, by showing to him the original warrant and delivering to and leaving with Edward S. Walsh a true copy thereof. 635

JOHN D. LYNN,
U. S. Marshal.
By FRANK H. RINE,
Field Deputy.

636

Paper 18

MARSHAL'S RETURN.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I, Harris S. Williams, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Warrant of Monition (*in personam*) with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A D. 1920.

HARRIS S. WILLIAMS,
 Clerk.

639

" PAPER 18 "

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE WESTERN DISTRICT OF NEW YORK, AND TO HIS DEPUTY, WHOMSOEVER.

640

GREETING:

WHEREAS, a Petition hath been filed in the District Court of the United States, for the Western District of New York, on the 12th day of June, one thousand nine hundred and twenty, by Frank F. Fix and Charles Fix, doing business under the name and style

of Fix Brothers, in an action entitled George Wagner, Libellant, against the steam tug "CHARLOTTE," her engines, boilers, machinery, boats, tackle, apparel and furniture, respondent, and praying that a monition issue against Edward S. Walsh, Supt. of Public Works of the State of New York against the said defendant, pursuant to the rules and practice of this Court; 641 642

Now, THEREFORE, you are hereby jointly and severally empowered, and strictly enjoined and commanded, that you admonish and cite, peremptorily, the said Edward S Walsh, Supt. of Public Works of the State of New York, if he shall be found within your district, to appear before the Judge of the District Court of the United States of America, for the Western District of New York, at the City of Buffalo, N. Y., on the 6th day of July, 1920, if it be a Court day, or else on the Court day next following, at ten o'clock in the forenoon, there to answer unto the Petition and Libel filed herein in a cause, collision, civil and maritime. 643

And further to do and receive in this behalf, as to justice shall appertain; and that you duly certify the Judge of the aforesaid Court what you shall do in the premises, together with these presents. 644

WITNESS, The Honorable John R. Hazel, Judge of the aforesaid Court, at the City of Rochester, N. Y., this 14th day of June, in the year of our Lord one thousand nine hundred and twenty.

Action for \$995.00 and costs, \$100. 645

[SEAL.]

MAY C. SICKMON,
Chief Deputy Clerk.

MESSRS. STANLEY & GIDLEY,

[SEAL] Proctor for Libellant.

Marine National Bank Building,
Buffalo, N. Y.

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MARSHAL'S RETURN.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

647

I HEREBY CERTIFY, That on the 19th day of July, 1920, at Buffalo, N. Y., in obedience to the within writ, I did personally serve a copy of the within Warrant of Monition on the within named defendant, Edward S. Walsh, Supt. of Public Works of the State of New York, by showing to him the original warrant and delivering to and leaving with Edward S. Walsh a true copy thereof.

648

JOHN D. LYNN,
U. S. Marshal.
 By FRANK H. RINE,
Field Deputy.

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

649

I, Harris S. Williams, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Warrant of Monition (in personam) with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

650

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of
 [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

" PAPER 19 "

651

UNITED STATES DISTRICT COURT—WEST-
ERN DISTRICT OF NEW YORK.

GEORGE WAGNER,

*Libelant,**against*

The Steam Tug " CHARLOTTE," her En-
gines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

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WILLIAM J. DOLLOFF,

*Libelant,**against*

The Steam Tug " CHARLOTTE," her En-
gines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

653

MURRAY TRANSPORTATION COMPANY,
Bailee of United States Navy Coal
Barge No. 483,

*Libelant,**against*

The Steam Tug " HENRY KOERBER,
JR.," her Boilers, Engines, Tackle,
Apparel and Furniture,
Respondent.

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Now comes CHARLES D. NEWTON, Attorney-General
of the State of New York, by EDWARD G. GRIFFIN, Dep-

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uty Attorney-General, appearing specially, and not otherwise, for the purpose of questioning the jurisdiction of this Court in the above entitled causes as proctor for the State of New York, the People of the State of New York, the Superintendent of Public Works of the State of New York and Edward S. Walsh, and respectfully suggests that this Honorable Court is with-

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out jurisdiction to proceed herein against Edward S. Walsh, Superintendent of Public Works of the State of New York, for the reason that as shown upon the face of the Libels, and Answers and Bonds filed herein, the petitions of the respondents filed herein, the order and monitions issued by this Court upon said petitions, the joinder of Edward S. Walsh, Superintendent of

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Public Works of the State of New York, as a party respondent herein constitutes suits, cases, controversies and causes against the State of New York, in which the State of New York has not consented to be sued here or in any other place; that this Court is, therefore, without jurisdiction of the subject matter set up in the foregoing petitions, orders or monitions

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directly or by reference or of the person of Edward S. Walsh, Superintendent of Public Works of the State of New York, and the cognizance thereof belongeth not to the Court.

CHARLES D. NEWTON,

Attorney-General of the State of New York,

By EDWARD G. GRIFFIN,

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Deputy Attorney-General, appearing specially and not otherwise as Proctor for the State of New York, the People of the State of New York, Edward S. Walsh, Superintendent of Public Works of the State of New York, and Edward S. Walsh.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

I have read the foregoing suggestion of want of jurisdiction by me subscribed and the facts therein stated are true to the best of my information and belief.

Subscribed and sworn to before me this
7th day of October, 1920.

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EDWARD G. GRIFFIN.

[SEAL.]

W. M. THOMAS,
Notary Public.

ORDERED, That the above suggestion of want of jurisdiction may be filed with this Court *nunc pro tunc* as of September 7th, 1920, and may be regarded as having been read and considered by this Court on the motion to dismiss for want of jurisdiction.

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Dated, Buffalo, N. Y.

JOHN R. HAZEL,

United States District Judge for the
Western District of New York.

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UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK, } ss.:

I, Harris S. Williams, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Suggestion for Want of Jurisdiction Order with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

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Paper 20

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of
[SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920.

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HARRIS S. WILLIAMS,

Clerk.

" PAPER 20 "

At a Term of the United States District Court, held in and for the Western District of New York at the Federal Building in the City of Buffalo, New York, on the 7th day of September, 1920.

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Present:

Hon. JOHN R. HAZEL,

District Judge Presiding.

MURRAY TRANSPORTATION COMPANY, Bailees
of United States Navy Coal Barge
669 No. 483, *Libelant,*
against

The Steam Tug " HENRY KOERBER, JR. ",
Her Boilers, Engines, Tackle, Apparel
and Furniture, *Respondent.*

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WILLIAM J. DOLLOFF, *Libelant,**against*

The Steam Tug " CHARLOTTE, " Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

Order deny-
ing motion
to dismiss
for want
of jurisdic-
tion.

GEORGE WAGNER,

*Libellant,**against*

The Steam Tug "CHARLOTTE," Her
Engines, Boilers, Machinery, Boats,
Tackle, Apparel and Furniture,
Respondent.

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The Claimants and Respondents in the above entitled causes having petitioned this Court *ex parte* and in accordance with the 59th rule in admiralty, orders were made by the undersigned at the June, 1920, term of this Court, held in the City of Rochester, New York, that process issue against Edward S. Walsh, Superintendent of Public Works of the State of New York herein, and whereupon monitions issued out of and under the seal of this Court addressed by the President of the United States of America to the Marshal of the Western District of New York and to his deputy whomsoever, by which the said Marshal and his deputy were jointly and severally empowered and strictly enjoined and commanded that they admonish and cite peremptorily the said Edward S. Walsh, Superintendent of Public Works of the State of New York, if he should be found within their district to appear before the Judge of this Court on the 6th day of July, 1920, there to answer unto the petitions and libels filed herein in causes, collisions, civil and maritime; and said monitions having been duly served upon said Edward S. Walsh, Superintendent of Public Works of the State of New York, within the Western District of New York and the return day thereto having been from time to time adjourned by direction of

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this Court and upon stipulation of the parties, Charles D. Newton, Attorney-General of the State of New York appeared specially and not otherwise for the purpose of questioning the jurisdiction of the Court as proctor upon the behalf of the State of New York, the People of the State of New York, the Superintendent of Public Works of the State of New York and the

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said Edward S. Walsh, before this Court, at the above time and place upon actual notice to Messrs. Stanley & Gidley, Proctors for the Respondents and Petitioners herein, and moved that the orders herein directing the issuance of process and the monitions to the said Edward S. Walsh, Superintendent of Public Works of the State of New York, should be vacated, set aside and withdrawn, and that these proceedings should be dismissed as against said Edward S. Walsh, Superintendent of Public Works of the State of New York, upon the ground that this Court is without jurisdiction of the person or the subject-matter so far as the Superintendent of Public Works of the State of New York is concerned.

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Now, after reading and fully considering the libels, answers, petitions, bonds and orders herein duly filed with this Court, and the monitions with the returns thereto now produced here; and after hearing Mr. Edward G. Griffin, Deputy Attorney-General and proctor for Edward S. Walsh, Superintendent of Public Works of the State of New York, for the motion, and

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Mr. Ellis H. Gidley, of counsel, for Messrs. Stanley & Gidley, proctors for the Respondents and Petitioners, The Steam Tug "Henry Koerber, Jr.," etc., and The Steam Tug "Charlotte," etc., opposed, and after due consideration of the arguments and briefs of said proctors, it is

ORDERED, That the motion of the Attorney-General

Paper 20

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of the State of New York is in all things denied with costs, upon the grounds stated in the opinion filed herewith.

Dated, BUFFALO, N. Y., Oct. 9, 1920.

JOHN R. HAZEL,

D. J.

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“ PAPER 20 ”

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Order Denying Motion to Dismiss for want of jurisdiction, with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

683

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A. D., 1920.

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[SEAL]

HARRIS S. WILLIAMS,

Clerk.

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" PAPER 21 "

DISTRICT COURT OF THE UNITED
STATES,

WESTERN DISTRICT OF NEW YORK,

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MURRAY TRANSPORTATION COMPANY, Bailee
of the United States Naval Barge No.
483*against*The Steam Tug " HENRY KOERBER, JR. ",
Her Boilers, Engines, Tackle, Apparel
and Furniture

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WILLIAM DOLLOFF

against

The Steam Tug " CHARLOTTE, " Etc.

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GEORGE WAGNER

against

The Steam Tug " CHARLOTTE, " Etc.

Charles D. Newton, Attorney-General.

Edward G. Griffin, Deputy Attorney-General, for
the State of New York.Stanley & Gidley (Ellis H. Gidley of Counsel), for
Respondents.

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Motion to dismiss monition.

HAZEL, DISTRICT JUDGE.—The separate libels sub-
stantially allege that the tug boats " Charlotte " and
" Henry Koerber, Jr. ", while under charter by the
Superintendent of Public Works of the State of New
York, and under his control and direction, were so

negligently navigated that damages were sustained by
 several barges and vessels of which the libelants were
 either bailees or owners. The proceeding is *in rem*.
 The owners of the towing tugs claim to be innocent
 parties to the subject-matter since the towing tugs at
 the time of the accident were chartered by the Super-
 intendent of Public Works of the State of New York
 for the benefit of the State under an Act of the Legis-
 lature authorizing him to tow boats for hire in the
 Erie canal, and appropriating \$200,000 to carry the
 provisions of the Act into effect. After the libel was
 filed the claimants of the tugs, under Admiralty Rule
 59, cited the Superintendent of Public Works to appear
 and answer the libel. In the petition it is stated that
 in case the Superintendent of Public Works cannot be
 found then the goods and chattels of the State of New
 York within this District be attached to the amount of
 the claim. The Deputy Attorney-General of the State
 appeared specially on the return of the monition and
 moved for a dismissal of the proceeding on the ground
 that this Court is without jurisdiction of the person
 of the subject-matter herein either in a libel *in rem*
 or *in personam*.

The point is whether the proceeding is a suit in law
 or equity against the State of New York or simply a
 suit in admiralty and of maritime jurisdiction. It is
 a suit, in my opinion, of the latter class, the decisions
 as I understand them, point to this conclusion. The
 only exemption from process by reason of a sovereign
 attribute under the admiralty law is possessed by the
 National government alone. *Workman v. Mayor, etc.*,
 179 U. S. 552. The eleventh amendment of the Con-
 stitution, true enough, provides that "The Judicial
 power of the United States shall not be construed to

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extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects of any Foreign State." But this broad provision has several times been construed in a way that does not include actions in rem to recover for a maritime tort, such action not being strictly civil suits at law or equity. The distinction between the latter forms of action and proceedings *in rem* is clearly suggested by Mr. Justice Story in his Commentaries on the Constitution of the United States (vol. 3, sec. 1683) wherein he expresses a doubt as to whether the eleventh amendment of the Constitution extends to causes of that character. He states that a suit in admiralty is not, correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both. In the Workman case, *supra*, it was argued that though courts of admiralty had the right to redress injuries to persons or property when the subject-matter was within the cognizance of such court and jurisdiction properly obtained of the person of the wrongdoer, still admiralty courts were required to refuse relief whenever the relief was denied by the local law of a particular State or the decisions therein owing to the attributes of sovereignty of the wrongdoer. But the Supreme Court was of a different opinion and held that decisions of a State Court could not abrogate maritime law, and that under the general maritime law, where the relation of master and servant exists, an owner of a vessel committing a maritime tort is responsible under the rule of respondent superior. The learned court discussed at length the question of the rights of a sovereign state to be relieved from suits against it, and reached the conclusion that no example is found in the admiralty law for determining that

one subject to suit and amenable to process should be relieved from a maritime tort upon such a theory. It was also held that a vessel in fault was liable for injury at sea to the injured party, the claim being enforceable in admiralty except "when the vessel is the property of the United States," and in that case because of reasons of public policy a liability could not be enforced in a direct proceeding against the ship. The principal in the Workman case, *supra*, The Siren, 7 Wall. 153, and John J. Stevens, 170 U. S 120, clearly leads to the conclusion, in my opinion, that all vessels, regardless of ownership, whether by individual, corporation or State of the Union, are amenable to process in admiralty, the National government alone being exempted. Although a suit at law or in equity where a State must respond is distinctly a suit against the State, as ably contended by the Deputy Attorney-General, yet it is clearly and definitely recognized in the law that a proceeding in admiralty is *sui generis* and general rules of procedure are treated as inapplicable. There is no rule of international application which in my estimation justifies the release of the Superintendent of Public Works who in his official capacity was authorized to engage in an enterprise involving the chartering of the tug boats in question for towing boats in the Erie canal, and who furthermore was empowered by statute to collect fees for the towing services rendered and deposit the same in the State treasury. Stress is laid upon the case of Governor of Georgia v. Juan Madrazo, 1 Peters 110, where the libel was against slaves captured by pirates and seized under the State law. There was no attachment against the *res* and Chief Justice Marshall who wrote the opinion treated the case as a libel *in personam* against the State since the action was to recover the

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Paper 21

- 706 proceeds in the treasury realized on the sale of the slaves. Such a proceeding he regarded as a suit against the State since the *res* was not in the possession of the District Court or properly within its jurisdiction. In this case, however, the proceeding is purely *in rem*, the admiralty court being in possession of the thing proceeded against, which suffices to enable bringing the State into the case under the 59th Rule in Admiralty for proceeding against it *in personam* through its proper official. Louisville Underwriters, 134 U. S. 120. Motion to dismiss monition denied.

September 25, 1920.

JOHN R. HAZEL,
D. J.

- 708 UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

- I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Opinion with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

- 709 And I further certify that I am the officer in whose custody it is required by law to be.

- IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 14th day of October, A. D. 1920.

- 710 [SEAL] HARRIS S. WILLIAMS,
Clerk.

| TITLE OF CASE | Attorneys | ABSTRACT OF COSTS | |
|--|--|-------------------|--------|
| | | To whom due | Amount |
| Murray Transportation Company, bailee of U. S. Navy Coal Barge No. 483 | Foley & Martin, solicitors for libellant, 64 Wall St., New York City. | | |
| Steamtug "Henry Koerber, Jr." her boilers, engines, etc. | Stanley & Gidley, solicitors for respondent Fix Brothers, owners steamtug "Henry Koerber, Jr." | | |
| Collision, approximately \$3,000. | | | |

| Date | CASH ACCOUNT — PLAINTIFF | Re- ceived | Dis- bursed | Date | CASH ACCOUNT — DEFENDANT | Re- ceived | Dis- bursed |
|----------------|---|---------------|----------------|----------------|--|---------------|----------------|
| | | | | | | | |
| April 15, 1920 | Deposit by Foley & Martin, attorneys..... | \$10 00 | | April 16, 1920 | Deposit by Stanley & Gidley.. | \$10 00 | |
| June 30, 1920 | Clerk's fees to date, list No. 81..... | | \$3 30 | June 30, 1920 | Clerk's fees to date, list No. 81..... | | \$3 25 |

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Paper 22

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| Date | | | FILINGS, PROCEEDINGS, ETC. | No. of words | Clerk's Fees | | Amount reported in emolument returns |
|-------|-----|------|---|--------------|--------------|-----------|--------------------------------------|
| Month | Day | Year | | | Plaintiff | Defendant | |
| Apr. | 15 | 1920 | Filed libel, ent. order for process | | \$0 25 | | |
| " | " | " | Issued warrant of arrest (returnable May 4, 1920) | | 1 00 | | |
| " | " | " | Issued notices of seizure (3) | | 1 80 | | |
| " | 16 | " | Filed claim | | | \$0 10 | |
| " | " | " | Entered order for release, filed bond | | | 25 | |
| " | " | " | Copy order for release to U. S. marshal | | | 10 | |
| " | 20 | " | Filed warrant of arrest, entered return | | 25 | | |
| June | 8 | " | Filed answer | | | 10 | |
| " | " | " | Filed petition of Frank F. Fix and Charles Fix, etc. | | | 10 | |
| " | " | " | Filed bond | | | 10 | |
| " | " | " | Filed and entered order that process issue against Edward E. Walsh, superintendent, etc. | | | 10 | |
| " | 10 | " | Issued warrant of monition in personam (to Edward E. Walsh, superintendent, etc.) | | | 1 00 | |
| " | " | " | Issued copy warrant of monition in personam (returnable July 6, 1920) | | | 1 00 | |
| " | " | " | | | | 50 | \$6 55 |
| July | 26 | " | Filed warrant of monition, entered return (defendant served July 19, 1920) | | \$0 25 | | \$0 25 |
| Sept. | 27 | " | Filed opinion, Hazel, J. (Chg. Adm. 1165) | | | | |
| Oct. | 8 | " | Filed suggestion of want of jurisdiction, order to file nunc pro tunc, etc. (Chg. No. 1165) | | | | |
| " | " | " | Filed and entered order denying motion to dismiss for want of jurisdiction (Chg. No. 1165) | | | | |

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK,

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Docket Entries with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 722

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920. 723

HARRIS S. WILLIAMS,
Clerk.

FILINGS, PROCEEDINGS, ETC.

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| Date | | | FILINGS, PROCEEDINGS, ETC. | No. of words | Clerk's Fees | | Amount reported in emolument returns |
|-------|-----|------|---|--------------|--------------|-----------|--------------------------------------|
| Month | Day | Year | | | Plaintiff | Defendant | |
| Feb. | 5 | 1920 | Filed libel. | ..... | \$0 10 | ..... | ..... |
| " | 10 | " | Filed claim. | ..... | \$0 10 | ..... | ..... |
| " | " | " | Filed claim, entered order. | ..... | 25 | ..... | ..... |
| " | " | " | Copy order for release for U. S. marshal. | ..... | 10 | ..... | ..... |
| Mar. | 3 | " | Filed stipulation extending time to answer. | ..... | 10 | ..... | ..... |
| " | 23 | " | Filed stipulation extending time to answer. | ..... | 10 | ..... | \$0 75 |
| June | 12 | " | Filed answer. | ..... | \$0 10 | ..... | ..... |
| " | " | " | Filed petition. | ..... | 10 | ..... | ..... |
| " | " | " | Filed and entered order that process issue against Edward E. Walsh, superintendent, etc. | ..... | 85 | ..... | ..... |
| " | " | " | Filed bond. | ..... | 10 | ..... | ..... |
| " | 14 | " | Issued warrant of monition in personam (returnable July 6, 1920) | ..... | 1 00 | ..... | ..... |
| " | " | " | Issued copy of warrant of monition in personam. | ..... | 50 | ..... | \$2 65 |
| July | 25 | " | Filed warrant of monition, entered return (defendant served July 19, 1920) | ..... | \$0 25 | ..... | \$0 25 |
| Sept. | 27 | " | Filed opinion, Hazel, J. (Chg. Adm., No. 1165) | ..... | ..... | ..... | ..... |
| Oct. | 8 | " | Filed suggestion of want of jurisdiction, order to file nunc pro tunc, etc. (Chg. No. 1165) | ..... | ..... | ..... | ..... |
| " | " | " | Filed and entered order denying motion to dismiss for want of jurisdiction (Chg. No. 1165) | | | | |

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Paper 23

736 UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Docket Entries with the Original
 737 entered and filed in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of
 738 [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

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| TITLE OF CASE | Attorneys | ABSTRACT OF COSTS | |
|---|--|-------------------|--------|
| | | To whom due | Amount |
| George Wagner vs. Steam Tug "Charlotte," her engines, boilers, machinery, etc. Collision, \$995 and interest. | Brown, Ely & Richards, solicitors for libellant. Stanley & Gidley, solicitors for claim- ant, Fix Brothers. | | |

| Date | CASH ACCOUNT — PLAINTIFF | Re- ceived | Dis- bursed | Date | CASH ACCOUNT — DEFENDANT | Re- ceived | Dis- bursed |
|---------------|--------------------------------------|---------------|----------------|---------------|-----------------------------------|---------------|----------------|
| Feb. 5, 1920 | Deposit by Brown, Ely & Richards. | \$10 00 | | Feb. 10, 1920 | Deposit by Stanley & Gidley. | \$10 00 | |
| Mar. 31, 1920 | Clerk's fees to date, List No. 80 | | \$0 10 | Mar. 31, 1920 | Clerk's fees to date, list No. 80 | | \$0 65 |
| | | | | June 30, 1920 | Clerk's fees to date, list No. 81 | | 2 65 |

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Paper 24

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| Date | | | FILINGS, PROCEEDINGS, ETC. | No. of words | CLERK'S FEES | | Amount reported in emolument returns |
|-------|-----|------|---|--------------|--------------|-----------|--------------------------------------|
| Month | Day | Year | | | Plaintiff | Defendant | |
| Feb. | 5 | 1920 | Filed libel. | ..... | \$0 10 | ..... | ..... |
| " | 10 | " | Filed claim. | ..... | ..... | \$0 10 | ..... |
| " | " | " | Filed bond for release, entered order. | ..... | ..... | 25 | ..... |
| " | " | " | Copy order for release for U. S. marshal. | ..... | ..... | 10 | ..... |
| Mar. | 3 | " | Filed stipulation extending time to answer. | ..... | ..... | 10 | ..... |
| " | 23 | " | Filed stipulation extending time to answer. | ..... | ..... | 10 | \$0 75 |
| June | 12 | " | Filed answer. | ..... | ..... | \$0 10 | ..... |
| " | " | " | Filed petition. | ..... | ..... | 10 | ..... |
| " | " | " | Filed and entered order that process issue against Edward E. Walsh, superintendent, etc. | ..... | ..... | 85 | ..... |
| " | " | " | Filed bond. | ..... | ..... | 10 | ..... |
| " | 14 | " | Filed warrant of monition in personam (returnable July 6, 1920). | ..... | ..... | 1 00 | ..... |
| " | " | " | Filed copy of warrant of monition in personam. | ..... | ..... | 50 | \$2 65 |
| July | 26 | " | Filed warrant of monition, entered return (defendant served July 19, 1920). | ..... | \$0 25 | ..... | ..... |
| Sept. | 27 | " | Filed opinion, Hazel, J. | ..... | 10 | ..... | ..... |
| " | " | " | Copy of opinion to Ellis H. Gidley. | ..... | 1 20 | ..... | \$1 55 |
| Oct. | 8 | " | Filed suggestion of want of jurisdiction, order to file nunc pro tunc as of September 7, 1920, entered order. | ..... | ..... | \$0 25 | ..... |
| " | " | " | Filed and entered order denying motion to dismiss for want of jurisdiction. | | | 1 45 | |

Memorandum in Support of Application

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UNITED STATES OF AMERICA, }
 WESTERN DISTRICT OF NEW YORK, } ss.:

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Docket Entries with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 752

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of [SEAL] Buffalo, in said District, this 14th day of October, A. D. 1920. 753

HARRIS S. WILLIAMS,

Clerk.

MEMORANDUM IN SUPPORT OF APPLICATION

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STATEMENT OF THE CAUSES.

Three causes in admiralty are involved. The steam tugs "Charlotte" and "Henry Koerber, Jr.", were chartered for the period, May 15, 1919 or to December 15, 1919, on behalf of the People of the State of New York, by Edward S. Walsh, Superintendent of Public Works of the State of New York, pursuant to Laws of New York of 1919, Chapter 264, for furnishing towing service on the Erie canal. (Charters papers "4," "5" and "6," pages 36, 49, 63). This statute provides: 755

"SECTION 1. The superintendent of public works is hereby authorized to provide such

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Memorandum in Support of Application

facilities as in his judgment may be necessary for the towing of boats on the canals of the state. Such towing service shall be furnished by the superintendent of public works under such rules and regulations as he shall adopt, and he is hereby authorized and empowered to impose and collect for such towing service such fees as in his judgment may seem fair and reasonable, and will foster and encourage the use of the state canals for the transportation of freight. The tables of distances on file in the office of the superintendent of public works shall be conclusive in computing distances on the canals. The moneys so collected shall be deposited in the state treasury by the superintendent of public works, pursuant to the provisions of the state finance law.

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"SECTION 2. For the purpose of carrying into effect the provisions of this act, the sum of two hundred thousand dollars (\$200,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable to the order of the superintendent of public works by the treasurer, on the warrant of the comptroller.

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"SECTION 3. This act shall take effect immediately."

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It is alleged in the libels filed Feb. 5, 1920, that the "Charlotte" on July 7, 1919, while under this charter and when navigating the Erie canal was responsible for injuries in collisions to the canal boats owned by the libelants, Dolloff and Wagner. (See libels, papers "2" and "3", pages 15, 22). Answers with charters annexed, papers "5" and "6", pages ; Petitions, papers "11" and "12" pages 101, 109). It is also alleged in the libel filed April 15, 1920, that the "Koerber" under similar circumstances, in the month of October, 1919, collided with the Navy Coal Barge No. 483, of which the libelant, Murray Transportation

Memorandum in Support of Application

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Company was bailee, while navigating the Erie canal. (See libel paper "1" page 11). Answer with charter annexed, paper "4" page 29). Petition, paper "10" page 93.)

The United States has not so far made any claim for the navy coal barge, nor have its officers appeared in the proceedings below. So far as we know the United States takes no interest in this litigation. Some claim is made in the petitions that the State of New York operated these tugs in a proprietary capacity. (Petitions, papers "10", "11" and "12", pages 93, 101, 109). We deem it unimportant whether the operation was in a governmental or proprietary capacity in view of *Workman v. New York City*, 179 U. S. 552.

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After issue was joined, the Claimants-Respondents, alleging that the State was not liable in its Court of Claims, petitioned the District Court on June 8 and 12, 1920, for process against Edward S. Walsh, Superintendent of Public Works of the State of New York. *The charters had expired at this time under their terms and the tugs, as shown by the pleadings, were in the possession of the Claimants, the State having no claim to them or interest in them. At no time has any relief been requested or granted individually or personally against Mr. Walsh. The proceedings have altogether been against him eo nomine in his capacity as a public officer. The papers are precise on this point in every instance.*

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The District Court in response to the petitions, submitted *ex parte* and conformably to the 59th Rule in Admiralty, made orders that monitions issue in all three causes against Edward S. Walsh, Superintendent of Public Works of the State of New York citing him to appear and answer upon oath, and in case he cannot be found, then "the goods and chattels of the

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Memorandum in Support of Application

State of New York used and controlled by him be attached to the amount sued for." (Orders, papers " 13 ", " 14 ", " 15 ", pages 118, 120, 123).

The monitions issued (papers " 16 ", " 17 " " 18 ", pages 125, 128, 130) and were served upon him within the Court's jurisdiction. (Order, paper " 20 ", page 137). *At no time in these proceedings has any res sub-*
 767 *jecta belonging to the State of New York or Mr. Walsh, or in which they claim any interest, been attached or brought under the jurisdiction of the District Court.*

We then appeared specially upon actual notice to the Petitioners and moved the District Court to dismiss the proceedings as against the Superintendent
 768 of Public Works for want of jurisdiction of the person and of the subject-matter. The orders for process having issued *ex parte* and of course, we deemed it only proper that we should submit our argument that the orders were made improvidently and without jurisdiction. We were permitted to file a suggestion of want of jurisdiction *nunc pro tunc* (Order, paper
 769 " 19 ", page 135). This was the only paper we used on the motion. It was probably unnecessary to file such a suggestion, since our claim of want of jurisdiction is made wholly upon the face of the record proper at that time filed with the court; nor do we rely here upon anything extraneous to the pleadings filed by the original parties, the petitions, monitions and subsequent orders and opinion.

770 The question of jurisdiction was argued by the Attorney-General of New York and the Proctor for the Claimants-Respondents on September 7, 1920. Briefs presenting more elaborately the questions discussed here were submitted and the court handed down its opinion on September 25, 1920. The order

Memorandum in Support of Application

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was entered on October 9, 1920 and we have since proceeded as speedily as is possible to certify and print these papers for submission here.

The opinion of the court filed with the order denying our motions to dismiss for want of jurisdiction clearly indicates the learned Judge's view of the facts heretofore treated and how he intends to apply the law. (Opinion, paper "21.") 772

He says in conclusion:

"In this case, however, the proceeding is purely *in rem*, the admiralty court being in possession of the thing proceeded against, which suffices to enable bringing the State into the case, under the 59th Rule in Admiralty for proceeding against it in personam through its proper official" (page 144). 773

II

A DISTRICT COURT IN ADMIRALTY IS WITHOUT JURISDICTION TO ENTERTAIN A CAUSE IN PERSONAM AGAINST A STATE. THESE ARE NOT PROCEEDINGS IN REM. 774

We rely upon the XIth Amendment and Article III, Section 2 of the Constitution, as both have been interpreted, chiefly, in *The Governor of Georgia v. Juan Madrazo*, 1 Pet. 110, *Ex Parte Juan Madrazo*, 7 Pet 627, and *Hans v. Louisiana*, 134 U. S. I.

We submit, the mere fact that property of a stranger has been brought under the jurisdiction of a court of Admiralty does not lay the basis for a claim *in personam* against a State. If the State still held these tugs under charter, there might be some reason for joining the State through its appropriate public officer, pending a decree for the disposition of the *res*. How- 775

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ever, at the time the Libels, Answers and Petitions were filed and process issued the State stood indifferent as to the tugs, since the charters had expired under their terms and they had been returned to their owners. (Docket Entries, papers "22", "23", "24," pages 145, 148, 151).

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These are purely cases involving the right of citizens to sue *in personam* their own State against its consent by virtue of the complete jurisdiction over Admiralty and marine causes conferred upon the Federal Courts. The State has expressly disclaimed in its Court of Claims all liability for "claims arising from damages resulting from the navigation of the canals." (Canal Law, § 47.) The papers allege that all the parties

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are citizens and residents of New York State. We, of course, deny, under the authorities above cited, that the particular jurisdiction assumed may be exercised. We had thought that the question was at rest since Mr. Justice Story said in his Commentaries on The Constitution.

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"It has been doubted whether this amendment (XI) extends to cases of admiralty and maritime jurisdiction *where the proceeding is in rem and not in personam*. There the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that "the judicial

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power of the United States shall not be construed to extend to any suit in law or equity, but a suit in admiralty is not, correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both" (Section 1683, Vol. 3, Original Edition).

Memorandum in Support of Application

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We submit that the case at bar differs from *United States v. Judge Peters*, 5 Cranch, 115. There, it was suggested that the state was the owner of a fund proceeded against in a District Court of Admiralty. Although the fund was in the hands of the State Treasurer, the officer had apparently never mingled it with the general funds of the State, but on the contrary had been indemnified to hold it for payment as the court might direct. Here there is no fund of the State attached. Money was appropriated from funds raised by taxation under Laws 1919, ch. 264, but it does not appear the particular appropriation has ever been paid out for any purpose in relation to these collisions. Indeed, the original appropriation has lapsed by operation of law. It is not shown that the Superintendent of Public Works has any moneys in his hands to pay these claims. There is no property before the court in which the State even suggests an interest. If judgment is rendered, it imminently appears that the general property of the State becomes subject to attachment, levy and execution.

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In the first *Madrazo* case it was said, regarding entirely the Constitution and ignoring the statute, that, since the cause was a suit against a State, it must be brought in this court under its original jurisdiction. This apparently is not the present rule, *California v. Southern Pacific Co.*, 157 U. S. 229, 258; *Ames v. Kansas*, 111 U. S. 439, 468. In the second *Madrazo* case, Chief Justice Marshall said it was a mere personal suit against the State, since the property, under a lapse in practice, was not in the custody of the court.

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Certainly he must have meant that the court could not proceed, since property of the State was not attached and brought into the jurisdiction. He could

Memorandum in Support of Application

786 not mean that if anyone's property is attached the State could be joined regardless of any interest in the property. We may assume that if property of Georgia, or in which it had an interest, had been attached, the court would have been competent to proceed *in rem*, unless the property was exempt under rules of comity as in *The Siren*, 7 Wall, 152.

787 The case at bar, among other things, differs from *Workman v. New York City*, *supra*, in that there a municipal corporation was the party respondent. Municipal corporations, it seems, are subject to suit in the Federal Courts like private persons and corporations. *Lincoln County v. Luning*, 133 U. S. 529.

It was not considered in the Court below as to
788 whether Mr. Walsh is liable individually and personally, aside from his representative capacity. It may suggest itself that the court should proceed against him. We have, therefore, joined him in this petition, because to hold him personally liable under the theory of the pleadings would be applying the local and customary law expressed in the rule of *respondeat superior*, which is expressly forbidden under the Workman case, *supra*.
789 It seems that this common law rule is not adapted to admiralty, 19 Harvard Law Review, 445. As an international rule of liability, the maxim *sic utere tuo ut alienum non laedas*, is suggested by that writer. At all events, if there was any superior to respond, it was the State and not its Superintendent;
790 if any property was wrongfully used it was that in possession of the State under lawful charters, and not the property of Mr. Walsh. Yet, so far there has been no attempt to charge him personally. We join him personally in the petition as a matter of caution.

It seems that the state employees in actual charge

Memorandum in Support of Application

of the tugs at the time of the collisions may be liable. 791
 It was not alleged that Mr. Walsh was present or in direct charge. Arguments for immunity seldom present much equity, yet, we are happy to say, that if the persons who actually did the injuries and who are subject to admiralty are pursued, the State under Section 46 of the Canal Law of New York, may guarantee the payment of any judgment procured against the employees by the claimants-respondents. 792

The foregoing and much more was submitted to the District Court.

III.

PROHIBITION AND/OR MANDAMUS IS THE PROPER REMEDY. 793

Our practice is based upon *The Lake Monroe*, 250 U. S. 246, and the application is made under Section 234 of the Judicial Code.

"The question presented is not whether a libelant *can recover* in the suit he has begun, but whether he can go into a court of admiralty to have his rights determined." *Ex parte Gordon*, 104 U. S. 515, 516. 794

The writ is not discretionary where the want of jurisdiction appears upon the face of the record proper either as to the person or the subject matter. *Re Cooper*, 143 U. S. 472, 495, 505. The case at bar differs from *Re Massachusetts*, 197 U. S. 482, since the State is the real party in interest and the learned district Judge so treats it in his opinion. *Palmer v. Ohio*, 248 U. S. 32, *Minnesota v. Hitchcock*, 185 U. S. 373, 386; *Hagood v. Southern*, 117 U. S. 52; *Re Ayres*, 123 U. S. 443; *Christian v. Atlantic Co.*, 133 U. S. 233. 795

The objection being to the jurisdiction of the person, it seems, that if we appear generally and plead now

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Memorandum in Support of Application

in the District Court, our right to raise the question again may be lost under *Porto Rico v. Ramos*, 232 U. S. 627.

Since these papers were prepared the McGahan case involving a proceeding *in rem* has been decided by the same Judge. We submit a motion in the later case 797 at the same time as this. (See *Matter of Petition on Behalf of the "Queen City"* presented herewith.)

Dated: Albany, N. Y.

October 13, 1920.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General of New York.

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EDWARD G. GRIFFIN,
Deputy Attorney-General.

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DEC 6 1920

JAMES D. MAHER;
CLERK.

Supreme Court of the United States

OCTOBER TERM 1920.

No. 25 ORIGINAL.

IN THE MATTER

OF

THE PETITION OF THE STATE OF NEW YORK,
THE PEOPLE OF THE STATE OF NEW
YORK, EDWARD S. WALSH, SUPERINTENDENT
OF PUBLIC WORKS OF THE STATE OF NEW YORK AND
EDWARD S. WALSH, INDIVIDUALLY AND PERSON-
ALLY, FOR A WRIT OF PROHIBITION AND/OR A WRIT OF
MANDAMUS,

AGAINST

HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES WITHIN AND FOR THE ^{Western} Dis-
TRICT OF NEW YORK, AND THE OFFICERS OF
SAID COURT.

RETURN.



Supreme Court of the United States

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MANDAMUS,

AGAINST

HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES WITHIN AND FOR THE ^{WESTERN} DIS-
TRICT OF NEW YORK, AND THE OFFICERS OF
SAID COURT.

RETURN.

I, John R. Hazel, Judge of the District Court of the
United States within and for the Western District of
New York, for and in behalf of myself and the officers
of said Court, in obedience to the order to show cause

herein, issued out of the Supreme Court of the United States on the 22nd day of November, 1920, upon a petition therefor, directing me and the officers of said Court to show cause why a writ of prohibition should not issue against me and the officers of said Court, and why a writ of mandamus should not issue against me and the officers of said Court in accordance with the prayer of the petition, hereby appear, certify and make return as follows:

1. Answering Paragraph One of said petition, it is true that libels were duly filed in said Court in three certain causes by Murray Transportation Company, Bailee of United States Navy Coal Barge No. 483, William J. Dolloff and George Wagner, respectively, against the Steam Tug "Henry Koerber, Jr.," and this Steam Tug "Charlotte," respectively, as therein stated.

2. Answering Paragraph Second of said petition, it is true that separate answers to said three respective libels were duly interposed and filed in said Court by the Proctors for the owners of the Steam Tugs "Henry Koerber, Jr." and "Charlotte," respectively, as claimants thereto, as therein stated.

3. Answering Paragraph Third of said petition, it is true that lawful bonds were duly filed in said Court by the Proctors for said claimants of said Steam Tugs, as therein stated.

4. Answering Paragraph Fourth of said petition, it is true that claimants-respondents duly filed petitions in said Court in each of said three respective causes, under the Fifty-Ninth Admiralty Rule for process against Edward S. Walsh, Superintendent of

Public Works of the State of New York, upon the ground that the respective collisions and resultant damages complained of and recited in said libels occurred while the claimants' Steam Tugs "Henry Koerber, Jr." and "Charlotte" were under charter from the claimants-respondents to Edward S. Walsh, Superintendent of Public Works of the State of New York, as therein stated, and also upon the further ground that the said Steam Tugs, at the time of the disasters complained of, were operated, controlled, directed and managed by the Superintendent of Public Works by virtue of said charter parties, and that in the event that fault be found and decreed against said Steam Tugs or those in charge thereof by reason of the matters complained of, that claimants as owners thereof would be and become liable and compelled to pay the same and would be thereby mulcted in damages for disasters to which they were total strangers, and that by reason thereof the charterer of said Steam Tugs ought to be proceeded against in the same actions so that the loss therefor resulting from such finding of fault as made would not fall upon said claimants who would be unable thereafter by operation of law to recoup any such loss against the Superintendent of Public Works or the People of the State of New York.

5. Answering Paragraph Fifth of said petition, it is true that orders were thereupon made and entered by me in each of said respective causes, granting the relief prayed for by the petitions of Claimants-Respondents of said Steam Tugs, and directing that the Admiralty process of the said Court issue against

said Edward S. Walsh, Superintendent of Public Works of the State of New York, under the Fifty Ninth Admiralty Rule.

6. Answering Paragraph Sixth of said petition, it is true that monitions were duly issued out of said Court to said Edward S. Walsh, Superintendent of Public Works of the State of New York, and that said monitions were thereafter duly personally served upon said Edward S. Walsh on the 19th day of July, 1920, at the City of Buffalo within the Western District of New York.

7. Answering Paragraph Seventh of said petition, it is true that on September 7, 1920, the Attorney General of the State of New York, appearing specially in all three causes on behalf of the State of New York, the People of the State of New York, the Superintendent of Public Works of the State of New York and Edward S. Walsh, orally moved the said Court to dismiss the proceedings as against Edward S. Walsh, Superintendent of Public Works of the State of New York, and filed a suggestion of want of jurisdiction. Such suggestion set forth that said Court was without jurisdiction to proceed therein against Edward S. Walsh, Superintendent of Public Works of the State of New York, for the reason that as shown on the face of the various pleadings filed in said Court, the joinder of said Edward S. Walsh, Superintendent of Public Works of the State of New York as a party respondent therein, constitutes suits, cases, controversies and causes against the State of New York, in which the State of New York has not consented to be sued here or in any other place, and

that said Court was therefore without jurisdiction of the subject matter set up in the foregoing petitions, orders or monitions directly or by reference or of the person of Edward S. Walsh, Superintendent of Public Works of the State of New York. A statement of facts was made orally before said Court by the Deputy Attorney General who appeared in support of said motion, which statement was orally traversed at the time by Proctors for the Claimants-Respondents. Argument was heard by said Court and briefs were submitted by the Attorney General and by Proctors for the Claimants-Respondents. It is true that said motion was thereafter denied by said Court, and that in accordance with the opinion set out in said petition, which contained my findings, I held that Edward S. Walsh, Superintendent of Public Works of the State of New York was not immune from arrest under Admiralty process issued conformably to the Fifty-ninth Admiralty Rule, and that he was properly brought into the causes herein under the Fifty-ninth Admiralty Rule, and I thereupon retained jurisdiction of the said Edward S. Walsh, Superintendent of Public Works of the State of New York.

8. Answering Paragraph Eighth of said petition, it is true that a certified copy of the record of the proceedings of the District Court of the United States within and for the Western District of New York, filed in said causes, is annexed to said petition except the bonds filed in said Court April 15, 1920, for release from arrest under process of the Steam Tug "Henry Koerber, Jr.", and the bonds filed in said Court February 10, 1920, in lieu of arrest under process of the Steam Tug "Charlotte".

9. Answering Paragraph Ninth of said petition, it is respectfully submitted that Edward S. Walsh, Superintendent of Public Works of the State of New York, was and is subject to the Admiralty jurisdiction of said Court and to the exercise of such jurisdiction by said Court as provided by the Fifty-ninth Admiralty Rule upon petitions therefor duly filed in said Court conformably to said Rule, and that the orders and monitions herein issued against said Edward S. Walsh, Superintendent of Public Works of the State of New York, conformably to said Rule and in the exercise of its admiralty jurisdiction by said Court do not constitute suits, cases, causes and controversies against the State of New York in which the State of New York has not consented to be sued, but rather that said proceedings, orders and process are *sui generis* and constitute proceedings of purely admiralty and maritime jurisdiction not subject to general rules of procedure, and that the said Court has and had entire and exclusive jurisdiction of the entire subject matter of the said actions, as well as of the *res* in each cause and of the parties connected therewith, and that said Edward S. Walsh, Superintendent of Public Works of the State of New York is not immune from seizure or arrest under process issuing out of said Court conformably to the Fifty-ninth Admiralty Rule, but that the due exercise of such process upon said Edward S. Walsh, Superintendent of Public Works of the State of New York within the Western District of New York, is sufficient to bring said Edward S. Walsh into such proceedings under the Fifty-ninth Admiralty Rule as

an official of the State of New York, and that said Court properly exercised its judicial powers in directing the application of the provisions of the Fifty-ninth Admiralty Rule according to both the letter and spirit of said Rule in requiring that Edward S. Walsh, Superintendent of Public Works of the State of New York, the charterer of said Steam Tugs, be proceeded against in the same suits for damages with the owners thereof upon suitable allegations of fault or negligence made under oath against him as such charterer by said Claimants-Respondents to the end that a multiplicity of suits be thereby avoided and a complete hearing and binding and settled adjudication be had of the entire subject matter upon the merits through the presence of all parties concerned therewith or liable therefor, and thereby prevent either a possible failure or denial of justice to the parties and thus achieve the prevention of delays in its proceedings and the due and satisfactory administration and distribution of justice.

And having fully answered on behalf of myself and the officers of said Court, I respectfully submit that said rule should be dismissed and said writs denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, John R. Hazel, Judge of the District Court of the United States within and for the Western District of New York, for and in behalf of myself and the officers of said Court, have hereunto set my hand and the seal of said Court this 3rd day of December, 1920.

John R. Hazel

(SEAL OF COURT.)

United States District Judge.



FILED
DEC 13 1920

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term, 1920

No. 25, ORIGINAL

Ex parte, in the matter of the STATE OF NEW YORK, EDWARD S. WALSH, Superintendent of Public Works of the State of New York and EDWARD S. WALSH, individually and personally (the "Charlotte" and the "Henry Koerber, Jr.")

Petitioner.

NO. 26, ORIGINAL

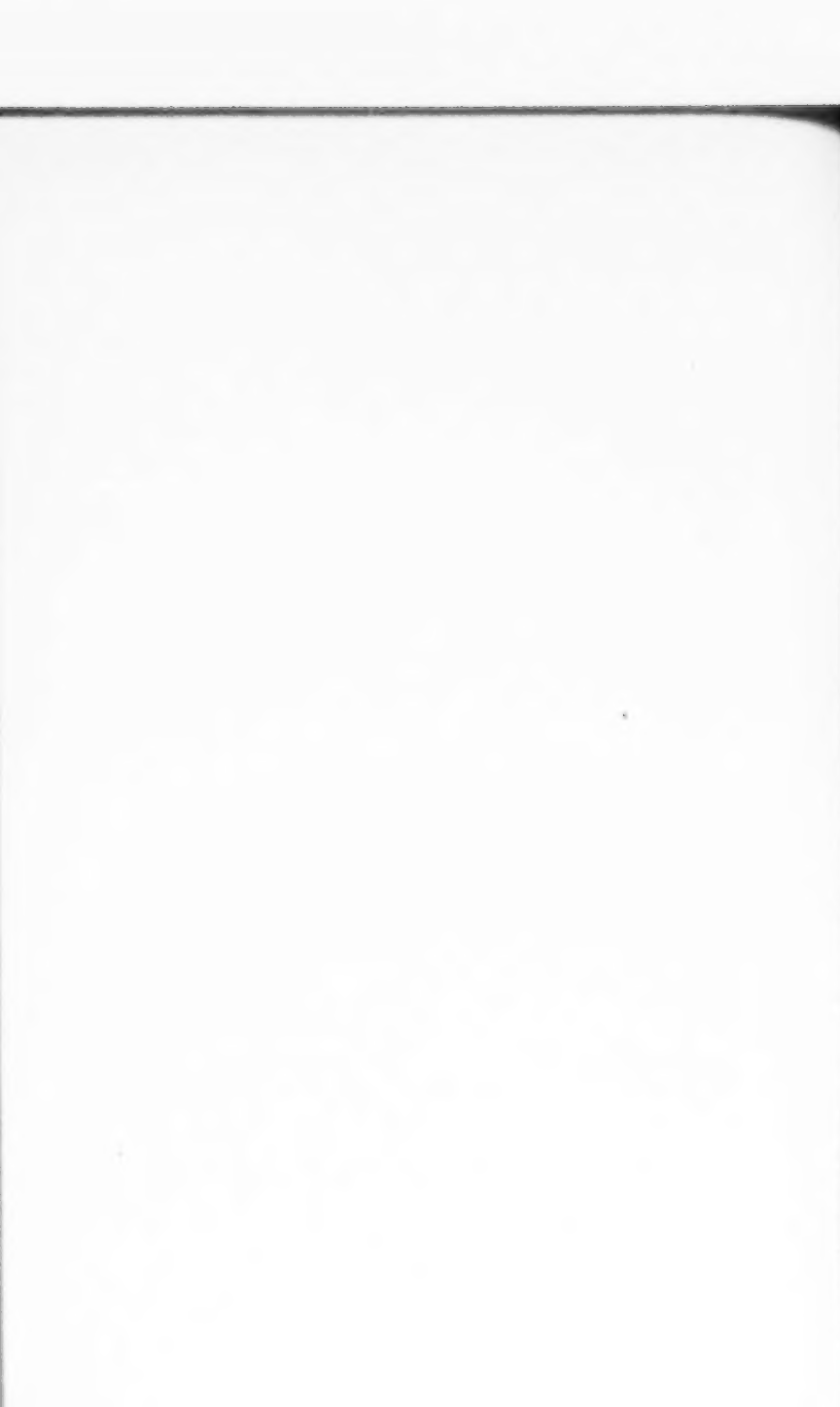
Ex parte, in the matter of the STATE OF NEW YORK, owner of the steam tug "Queen City."

Petitioner.

Brief for Petitioners on Rule to Show Cause

CHARLES D. NEWTON,
Attorney-General of New York.

EDWARD G. GRIFFIN,
Deputy Attorney-General.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

Nos. 25 and 26 Originals.

Ex Parte, In the Matter of the
STATE OF NEW YORK, EDWARD S.
WALSH, Superintendent of Pub-
lic Works of the State of New
York, and EDWARD S. WALSH,
Individually and Personally
("THE CHARLOTTE" and "THE
HENRY KOERBER, JR."),
Petitioner.

Ex Parte, In the Matter of the
STATE OF NEW YORK, Owner of
the Steam Tug "QUEEN CITY"
Petitioner.

BRIEF FOR PETITIONERS, THE STATE OF NEW YORK ON RETURN OF RULE TO SHOW CAUSE WHY A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS SHOULD NOT ISSUE.

Four causes in Admiralty are presented here, which will hereafter be referred to by the names of the vessels involved, "The Charlotte," "The Henry Koerber, Jr." (Ex Parte 25) and "The Queen City" (Ex Parte 26).

Citizens seek to sue their own State *in personam* and to sue a vessel operated by a State in a governmental capacity through virtue of the inclusive power over admiralty and maritime causes conferred upon the Federal Courts.

The United States District Judge for the Western District of New York has taken jurisdiction of these causes and issued process *in personam* and *in rem* respectively. We seek to prohibit the application of this jurisdiction to the State or to its vessel.

THE FACTS.

"The Charlotte" and "The Koerber."

The steam tugs "Charlotte" and "Henry Koerber, Jr.", were chartered for the period, May 15, 1919, to December 15, 1919, on behalf of the People of the State of New York, by Edward S. Walsh, Superintendent of Public Works of the State of New York, pursuant to Laws of New York of 1919, Chapter 264, for furnishing towing service on the Erie canal. (Charters papers "4," "5" and "6," pages 36, 49, 63.) This statute provides:

"SECTION 1. The superintendent of public works is hereby authorized to provide such facilities as in his judgment may be necessary for the towing of boats on the canals of the state. Such towing service shall be furnished by the superintendent of public works under such rules and regulations as he shall adopt, and he is hereby authorized and empowered to impose and collect for such towing service such fees as in his judgment may seem fair and reasonable, and will foster and encourage the use of the state canals for the transportation of freight. The tables of distance on file in the office of the superintendent of public works shall be conclusive in computing distances on the canals. The moneys so collected shall be deposited in the state treasury by the superintendent of public works, pursuant to the provisions of the state finance law.

" SECTION 2. For the purpose of carrying into effect the provisions of this act, the sum of two hundred thousand dollars (\$200,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable to the order of the superintendent of public works by the treasurer, on the warrant of the comptroller.

" SECTION 3 This act shall take effect immediately."

It is alleged in the libels filed Feb. 5, 1920, that the " Charlotte " on July 7, 1919, while under this charter and when navigating the Erie canal was responsible for injuries in collisions to the canal boats owned by the libelants, Dolloff and Wagner. (See libels, papers " 2 " and " 3 ", pages 15, 22. Answers with charters annexed, papers " 5 " and " 6 ", pages 42, 55; Petitions, papers " 11 " and " 12 ", pages 101, 109.) It is also alleged in the libel filed April 15, 1920, that the " Koerber " under similar circumstances, in the month of October, 1919, collided with the Navy Coal Barge No. 483, of which the libelant, Murray Transportation Company, was bailee, while navigating the Erie canal. (See libel paper " 1," page 11. Answer with charter annexed, paper " 4," page 29. Petition, paper " 10," page 93.) [The United States has not so far made any claim for the navy coal barge, nor have its officers appeared in the proceedings below. So far as we know the United States takes no interest in this litigation.] The State did not indemnify the Claimants-Respondents for any misuse of the tugs by a bond or undertaking, as in *The South Coast*, 251 U. S. 519, nor can there

be a claim for contribution as under *The Ira M. Hedges*, 218 U. S. 264.

After issue was joined, the Claimants-Respondents, alleging that the State was not liable in its Court of Claims, petitioned the District Court on June 8 and 12, 1920, for process against Edward S. Walsh, Superintendent of Public Works of the State of New York. *The charters had expired at this time under their terms and the tugs, as shown by the pleadings, were in the possession of the Claimants, the State having no claim to them or interest in them.* *United States v. Ansonia Brass, etc., Co.*, 218 U. S. 452. *At no time has any relief been requested or granted individually or personally against Mr. Walsh. The proceedings have altogether been against him eo nomine in his capacity as a public officer. The papers are precise on this point in every instance.*

The District Court in response to the petitions, submitted *ex parte* and conformably to the 59th Rule in Admiralty, made orders that monitions issue in all three causes against Edward S. Walsh, Superintendent of Public Works of the State of New York citing him to appear and answer upon oath, and in case he cannot be found, then "the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for." (Orders, papers "13", "14", "15", pages 118, 120, 123.)

The monitions issued (papers "16", "17", "18", pages 125, 128, 130) and were served upon him within the Court's jurisdiction. (Order, paper "20", page 137.) *At no time in these proceedings has any res subjecta belonging to the State of New York or Mr. Walsh, or in which*

they claim any interest, been attached or brought under the jurisdiction of the District Court.

We then appeared specially upon actual notice to the Claimants-Respondents and moved the District Court to dismiss the proceedings as against the Superintendent of Public Works for want of jurisdiction of the person and of the subject-matter. The orders for process having issued *ex parte* and of course, we deemed it only proper that we should submit our argument that the orders were made improvidently and without jurisdiction. We were permitted to file a suggestion of want of jurisdiction *nunc pro tunc* (Order, paper "19", page 135.) This was the only paper we used on the motion. It was probably unnecessary to file such a suggestion, since our claim of want of jurisdiction is made wholly upon the face of the record proper at that time filed with the court; nor do we rely here upon anything outside of the pleadings filed by the original parties, the petitions, monitions, docket entries and subsequent orders and opinion.

The question of jurisdiction was argued by the Attorney-General of New York and the Proctor for the Claimants-Respondents on September 7, 1920, and the court handed down its opinion on September 25, 1920. The order was entered on October 9, 1920.

The opinion of the court filed with the order denying our motions to dismiss for want of jurisdiction clearly indicates the learned Judge's view of the facts heretofore treated and how he intends to apply the law. (Opinion, paper "21.")

He says in conclusion :

“ In this case, however, the proceeding is purely *in rem*, the admiralty court being in possession of the thing proceeded against, which suffices to enable bringing the State into the case, under the 59th Rule in Admiralty for proceeding against it in personam through its proper official ” (page 144).

“ *The Queen City.* ”

“ The Queen City ” is a steam tug owned by the State of New York and operated in a governmental capacity for the repair and maintenance of the Erie Canal. It is not operated for the same purposes as were the “ Charlotte ” and “ Koerber ” (pages 14-16). The libelants’ intestate on July 26, 1919, was allowed aboard with others of a church picnic for a ride between Tonawanda and Buffalo, N. Y., on the Erie Canal. Miss McGahan fell overboard and was drowned. (See Libel Paper “ 1 ” page 16.) A claim was filed in the Court of Claims of New York for her death and dismissed for want of jurisdiction upon motion. It is obvious, although no opinion was written, that the reason for dismissal was that the State was not liable, since its officers in disregard of strictly legal authority had used the State’s boat for the entertainment of the picnic party; further the State was not liable in its Court of Claims, because it has expressly provided by Section 47 of the Canal Law that its conceded liability “ shall not extend to claims arising from damages resulting from the navigation of the canals. ” (See Claim, Affidavit and Judgment Papers “ 1, ” “ 2 ” and “ 3 ” attached to Suggestion of Want of Jurisdiction pages 16-26.) The determination

of the Court of Claims was affirmed unanimously without opinion by the intermediate appellate court of this State on December 1, 1910. (Supreme Court, Appellate Division, 4th Department.)

On October 11, 1920, the libel was filed in Admiralty for substantially the same cause of action as in the Court of Claims. Process issued *in rem* in this case, and not *in personam* (See Warrant of Arrest, page 34.) On October 25, 1920, we filed a suggestion of want of jurisdiction which was promptly overruled by the United States District Court for the Western District of New York. The suggestion in this cause sets up new matter outside of the pleading and alleges that the vessel is and was owned and operated by the State for governmental purposes. In submitting our suggestion to the learned Judge we frankly anticipated his decision, because of his opinion in the "Henry Koerber, Jr.," and "Charlotte" causes, and our motion to dismiss was inferentially denied upon the grounds stated in the opinion in those causes (pages 140-144 of Charlotte and Koerber papers).

We made no formal claim to the Queen City but filed a suggestion of want of jurisdiction. The suggestion itself sets up the ownership and use of "The Queen City."

THE JUDICIAL POWER ESTABLISHED BY THE CONSTITUTION DID NOT COMPREHEND CASES AT THAT TIME UNKNOWN TO THE LAW OR FORBIDDEN BY THE LAW; CONSEQUENTLY THE RIGHT OF A CITIZEN TO SUE HIS OWN STATE IS NOT TO BE IMPLIED EVEN UNDER THE VERY GENERAL TERMS CONFERRING ADMIRALTY AND MARITIME JURISDICTION UPON THE FEDERAL COURTS.

In three of the cases at bar the libelants and petitioners are citizens of New York. (Ex Parte 25, "Charlotte" and "Koerber," pages 11, 15, 22, 29, 42, 55, 93, 101, 109; in Ex Parte 26 "Queen City," it is alleged that the libelants are residents of New York, page 8).

The question whether the interpretative provisions of the XIth Amendment, narrowed as they are only to suits at law or equity, include suits in Admiralty against a state by aliens or citizens of other states is, therefore, not presented here. Assuming that *Chisholm v. Georgia*, 2 Dall. 419, was correctly decided, despite the criticism of its doctrine in *Hans v. Louisiana* 134 U. S. 1, and its rejection of Hamilton's views expressed in *The Federalist*, No. 81, there has never been any affirmative provision in the Constitution permitting a citizen to sue his own state in any tribunal. The concluding part of Section 2, Article 3, is indeed a disclaimer of any purpose to include a suit by a citizen against his own state. The provision is that the judicial power shall extend to all suits "between a state or the citizens thereof and foreign states, citizens or subjects." The judicial power was not made to extend to suits "between a state and the citizens thereof."

There are no grounds for jurisdiction *in personam* in the cases at bar, unless it can be true that the judicial power over admiralty is all comprehensive "without regard to the condition of the party," as was said by Marshall in comparing the judicial power granted by the opening part of Section 2, Article III with the part following where the parties are specified, *Cohens v. Virginia*, 6 Wheat. 264, 378. Yet, even there, the Chief Justice was only arguing for an extension of the *appellate* power of this court and was not suggesting that the opening clause extended to all cases in inferior courts, regardless of whether a state was sued.

Although the sovereignty of our states may be limited, nevertheless, they have always partaken of the attribute of immunity from suit, except as they have expressly surrendered it. *Gibbons v. Ogden*, 9 Wheat. 1, 187. *Foster on The Constitution*, Section 41. That a sovereign is not subject to suit except with its consent was adopted by the common law even more fully than in systems founded on the civil law. In America the situation of suitors as against a sovereign is even less favorable than in England, for we have not adopted the Petition of Right or the *Monstrans de droit*. On the other hand our constitutional system limits the protective effect of an act of the legislature, but usually it is the officer and not the state whose act goes unsanctioned. General immunity from suit is, therefore, one of the attributes of sovereignty retained by the states and not to be disregarded, except where it has been definitely surrendered. 17 Fed. Rep. 188 Note. *Beers v. Arkansas*, 20 How. 527. *The Arlington*

Case, 106 U. S. 196, Dissenting Opinions. This was the conclusion in *Hans v. Louisiana*, 134 U. S. 1. See also *Duhne v. New Jersey*, 251 U. S. 311 and cases cited. *Illinois Central R. R. Co. v. Adams*, 180 U. S. 28, 38; *Bell v. Mississippi*, 177 U. S. 693.

However eccentric the doctrines of admiralty may be, no legal reason suggests itself why the rule should differ in this particular jurisdiction. In 1833 the court could make no distinction In *Ex Parte Juan Madrazo*, 7 Pet. 627. There an alien filed a libel against the State of Georgia through its Governor for certain slaves and the proceeds of the sale of others in the possession of the State. Through a lapse in practice in another proceeding, no process *in rem* had been issued in the District Court, but the libelant had sought to supply this upon application to the Circuit Court. Yet, Chief Justice Marshall summarily disposed of the whole proceeding in the following opinion at page 630:

“ The case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state.”

When the cause was earlier considered in *Governor of Georgia v. Madrazo*, 1 Pet. 110, and dismissed, because as a suit against a State, this court was held to have exclusive jurisdiction, Mr. Justice Johnson in his dissenting opinion at page

128 applying the XIth Amendment to admiralty said, that even in the case of an alien "that a state is not now suable by an individual, is a question on which the Court below could not have paused a moment."

Mr. Justice Story's construction of the effect of these decisions is compelling and he says in his *Commentaries on The Constitution of the United States*, Vol. 3, Section 1683, first edition of 1833:

"It has been doubted whether this amendment (XI) extends to cases of admiralty and maritime jurisdiction *where the proceeding is in rem and not in personam*. There the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, but a suit in admiralty is not, correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both'"

U. S. v. Blight, 3 Holls. Law Journal, 197, 225 and the Madrazzo cases.

Except that the suits in the Koerber and Charlotte causes are by citizens against their own state, the question presented here is no different than in both Madrazzo cases. The jurisdiction of a District Court is sought. No *res subjecta* directly concerned in the collisions and owned by or in the possession of the state has been attached or reduced to the jurisdiction of the District Court. Yet, the attachment of property belonging to strangers, the Claimants-Respondents, and who no longer have privity with the state, is said

by the learned Judge below to be sufficient for an action *in rem*.

We submit, that the mere fact property of a stranger has been brought under the jurisdiction of a court of Admiralty does not lay the basis for a claim *in personam* against a State. If the State still held these tugs under charter, there might be some reason for joining the State through its appropriate public officer, pending a decree for the disposition of the *res*. However, at the time the Libels, Answers and Petitions were filed and process issued the State stood indifferent as to the tugs, since the charters had expired under their terms and they had been returned to their owners. (Docket Entries, papers " 22 ", " 23 ", " 24, " pages 145, 148, 151.) In the second *Madrazzo* case, Chief Justice Marshall said it was a mere personal suit against the State, since the property was not in the custody of the court. Certainly he must have meant that the court could not proceed, since property *of the State* was not attached and brought into the jurisdiction. He could not have meant that if anyone's property is attached the State could have been joined regardless of any interest in the property. We may assume that if property of Georgia, or in which it had an interest, had been attached, the court would have been competent to proceed *in rem*, unless the property was exempt under rules of comity as elsewhere discussed in connection with the Queen City.

The great case of *Workman v. New York City*, 179 U. S. 552, may give difficulties if the causes at bar are found not to be suits against the State, but in the particular point now under discussion

it is not controlling. There a city fire boat was held exempt *in rem*, but the municipality was held liable *in personam*. Municipal corporations are generally liable like private persons and corporations at law and in equity with few exceptions and one of which was rejected as to admiralty in the *Workman* case. At any rate, municipal corporations do not always derive the immunity of a sovereign, but are suable in proper cases in the Federal Courts. *Lincoln County v. Luning*, 133 U. S. 529; *Meriwether v. Garrett*, 102 U. S. 472; *Rees v. Watertown*, 19 Wall. 107; *Wheeler v. City of Chicago*, 68 Fed. 526; *Palatka Water Works v. Palatka*, 127 Fed. 161; *Camden Interstate Ry. Co. v. City of Catlettsburg*, 129 Fed. 421.

Judge Story leaves open the question as to whether a vessel owned by a state is liable *in rem*. We will in another point attempt to show that under rules of comity the "Queen City" is not so liable, since she is and was operated by the State in governmental capacity.

II

WHATEVER FEDERAL JURISDICTION EXISTS IN THE KOERBER AND CHARLOTTE CAUSES IS IN THE UNITED STATES SUPREME COURT. THE STATUTE CONFERRING CONCURRENT JURISDICTION UPON INFERIOR FEDERAL COURTS IN SUITS AGAINST STATES IS UNCONSTITUTIONAL.

In the first *Madrazo* case, 1 Pet. 110, Chief Justice Marshall said that under clause 2, section 2, article III of the Constitution exclusive jurisdiction is given this court where a State is a party. He, therefore, disregarded the statute

(now section 233 of the Judicial Code) granting concurrent jurisdiction to inferior courts. Mr. Justice Johnson dissented upon this point and apparently there has since been a disinclination to follow the prevailing opinion in the first *Madrazo* case, as witness the dicta in *California v. Southern Pacific Co.*, 157 U. S. 229, 258, and in *Ames v. Kansas*, 111 U. S. 449, 468. Nevertheless, it seems the question should be submitted, since the early case has not been distinctly overruled.

We are not ourselves embarrassed by the rule of *Marbury v. Madison*, 1 Cranch, 49, that Congress could not constitutionally impose upon this court the duty to issue writs of mandamus, etc., under section 13 of the Judiciary Act of 1789 (now section 234 of the Judicial Code). If that case is to be regarded as still authority upon the point, we here seek only the appellate jurisdiction of this court, since the process prayed for will run against an inferior judicial officer and not to an executive officer.

III

THE KOERBER AND CHARLOTTE CAUSES ARE SUITS AGAINST THE STATE OF NEW YORK.

The Superintendent of Public Works is a constitutional officer, and in his particular sphere rises almost to the dignity of the Governor, whose powers as the general executive officer of the State were held to be inseparable from the interest of the State in the *Madrazo* cases.

The canals of New York for nearly a century have been financially its greatest undertaking, and until the development of our improved high-

ways, the canals were our most important public work. Accordingly various Constitutional provisions were adopted for their preservation and development. Among these was the provision creating the office and defining the duties of the Superintendent. Article 5, section 3, adopted in 1846, and from time to time amended, provides:

“ Superintendent of Public Works; Appointment; Powers and Duties of.

“ A superintendent of public works shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office until the end of the term of the governor by whom he was nominated, and until his successor is appointed and qualified. He shall receive a compensation to be fixed by law. He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals, except so far as the execution of the laws relating to such construction and improvement shall be confided to the state engineer and surveyor; subject to the control of the legislature, he shall make the rules and regulations for the navigation and use of the canals. He may be suspended or removed from office by the governor, whenever, in his judgment, the public interest shall so require; but in case of the removal of such superintendent of public works from office, the governor shall file with the secretary of state a statement of the cause of such removal, and shall report such removal and the cause thereof to the legislature at its next session. The superintendent of public works shall appoint not

more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the legislature, and who shall receive for their services a compensation to be fixed by law. They shall hold their office for three years, subject to suspension or removal by the superintendent of public works, whenever, in his judgment, the public interest shall so require. Any vacancy in the office of any such assistant superintendent shall be filled for the remainder of the term for which he was appointed, by the superintendent of public works; but in case of the suspension or removal of any such assistant superintendent by him, he shall at once report to the governor, in writing, the cause of such removal. All other persons employed in the care and management of the canals, except collectors of tolls, and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and be subject to suspension or removal by him. The superintendent of public works shall perform all the duties of the former canal commissioners and board of canal commissioners, as now declared by law, until otherwise provided by the legislature. The governor, by and with the advice and consent of the senate, shall have power to fill vacancies in the office of superintendent of public works; if the senate be not in session, he may grant commissions which shall expire at the end of the next succeeding session of the senate."

Let it be noted that his term coincides with that of the Governor; that he gives security to the State that he will protect *its* interests; that, except as he may be disciplined by the Governor and certain powers are reserved to the State Engineer, his responsibility for fostering and develop-

ing the canals is absolute and his powers are supreme. He, therefore, represents the State in connection with the canals as much as the Governor in the *Madrazo* cases represented the whole State.

In the *Koerber and Charlotte* cases he is not asked to do any specific act. Therefore the suit is not one against him personally which will abate with the termination of his office on January 1, 1921, as in *Richardson v. McChesney*, 218 U. S. 487. No damages are asked against him personally nor is any order or process issued against him individually. (See Prayers for Relief in Petition, Orders and Monitions Ex Parte 25, pages 98, 106, 114; 118, 121, 124; 126, 128, 131.) In none of the petitions is there a single allegation that he in his official or personal capacity neglected or did anything to the harm of the Claimants-Respondents. The Claimants-Respondents pray that the property of the State be taken and that judgment be rendered generally against the Superintendent of Public Works. It is the property of the State and not that of Mr. Walsh which is imminently endangered and the learned Judge below so takes it. (Opinion page 140.)

It is true that attachment against property of the State under the control of the Superintendent is asked for, but the general prayer for relief is not so narrowed. As a result property of the State not even subject to a maritime lien is endangered. *The Arkansas*, 17 Fed. 383, cited with approval in *The Blackheath*, 195 U. S. 361. No attempt was made by any of the parties opposed

to us to amend their pleadings to definitely make these personal suits.

The *Workman* case, *supra*, holds that a city could not avail itself of the defence established by our customary law, that a municipality is not liable for damages resulting from governmental functions from which it derives no direct benefit. It is alleged in the petitions (pages 96, 104, 112, paragraph " V ") that the State operated these tugs in a proprietary capacity. If the State were not generally immune from suit it seems it would be immaterial whether it operated the vessels in a governmental or proprietary capacity. Yet, it is immune and the distinction between a governmental and proprietary capacity need not be made.

Whether Mr. Walsh received any benefit is of importance in determining where the ultimate liability rested. We contend that the liability is upon the State, but that its failure to provide a remedy and to concede a liability leaves the Claimants-Respondents in a position where they cannot enforce this liability against the State.

The State being liable, but the Claimants-Respondents remediless, should not result in turning the liability upon the Superintendent individually and personally. If he is liable it is either under the rule *respondeat superior* or the rule *sic utere tuo ut alienum non laedas*. These imply either a benefit to the master from the acts of his servants, or a beneficial interest in the property wrongfully used. The principle of *respondeat superior* does not imply a liability from junior to senior so that there is joint liability upon the boss, the foreman, the superintendent

and the president of the corporation. The master who employs all the subordinates in the one to whom the liability alone attaches under the rule. In some cases the master may not be liable at all, but that is because of the operation of other rules. See "*Respondeat Superior*" by Professor Oliver L. McCaskill, Cornell Law Quarterly, vol. V, page 409, May, 1920; vol. VI, page 56 (continued), November, 1920.

Indeed, it has been said that the rule *respondeat superior* is not adapted to admiralty; 19 Harvard Law Review 445, and that writer suggests the substitution of the rule operating where one so uses his own property as to injure another. See also Chief Justice Jay's charge to the grand jury in *The Trial of Hatfield*, Whartons State Trials, page 49. *The Paquette Habana*, 189 U. S. 453, 465; *Osborn v. The United States Bank*, 9 Wheat, 738, 865; *Lamar v. Browne*, 92 U. S. 187, 199; *Spaulding v. Vilas*, 161 U. S. 483, 496. Of interest is also *New York Central Railroad Co. v. White*, 243 U. S. 188, condemning the doctrine of *Ives v. South Buffalo Ry.*, 201 N. Y. 271, as to the universality of common law rules of liability.

It seems clear that if there is any superior to respond it is the State of New York and not its Superintendent; that if any one's property was wrongfully used, it was that of the State under lawful charters, and not the property of Mr. Walsh. If any one is liable it must be the State or its servants directly concerned in the collisions. Mr. Walsh was not even a fellow servant of these.

We do not object to the application of "the rule of the law" over public officers, but we see

no reason why *droit administrative* should be built up in admiralty. See *Dicey's The Law of The Constitution*, especially chapter XII, seventh edition. We join Mr. Walsh personally as a matter of caution, although we perceive no allegations in the record by which Mr. Walsh is charged individually with liability.

Arguments for immunity seldom present much equity. Consequently we are happy to say that under section 46 of the Canal Law of New York, the State may guarantee the payment of damages upon any judgment rendered against any of its officers or servants who may actually have been guilty of wrongdoing and who are pecuniarily irresponsible. Section 46 of the Canal Law provides:

“ Section 46. Commissioners of the canal fund to allow claims. The commissioners of the canal fund may allow claims for moneys paid by the superintendent of public works or an assistant superintendent or an officer or person employed by them, or in the engineer department of the canals, in the care, management, superintendence and repair thereof, for judgment recovered against them or any of them, in any action instituted for any act done by them, pursuant to the provisions of this chapter, or for costs and expenses incurred in such action, or in an action instituted by them or any of them under such chapter. Before allowing a claim, the commissioners shall examine into the circumstances under which such costs and expenses were incurred, or judgments recovered, and shall allow such claims or such part thereof as they deem reasonable, if satisfied that the officer or person making the same has been subjected to such costs, expenses or judg-

ments, while acting in good faith in the discharge of his duty under a law of the state. The commissioners, in their discretion, may direct the attorney-general or employ other counsel to take all necessary steps to defend the interest of the state in actions and proceedings arising under the laws respecting the canals, or from the appraisement of damages thereon."

This section neither extends the liabilities of the State nor of its officers and servants. It simply protects subordinates of the State and assures the collection of private judgments.

No relief, however, has been sought against those who were actually in charge of the tugs at the time of the accidents. The Claimants-Respondents cannot say they are without a remedy against anyone or that application for their remedy would be a vain pursuit.

There is no property of the State or funds under the control of the Superintendent from which a judgment against the State could lawfully and constitutionally be satisfied, even if the Court were satisfied to treat these proceedings as solely *in rem*.

Our State Constitution provides in Article III, Section 21:

"*Appropriation Bills.*—Section 21. No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing, or reviving an appropriation, shall distinctly specify the

sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

The money appropriated under Laws of 1919, Chapter 264, was for a specific purpose and not for the payment of damage claims. Further, although this is not in the record, the appropriation is exhausted. Certainly the claims cannot be satisfied out of the funds provided for in the law authorizing the charters or out of general property or funds of the State.

The State has expressly denied liability for claims arising from the navigation of the canals. This is found in Section 47 of the Canal Law providing as follows:

"Section 47. Claims for damages. There shall be allowed and paid to every person sustaining damages from the canals or from their use or management, or resulting or arising from the neglect or conduct of any officer of the state having charge thereof, or resulting or arising from any accident, or other matter or thing connected with the canals, the amount of such damages to be ascertained and determined by the proper action or proceedings before the court of claims; but no judgment shall be awarded by such court for any such damages in any case unless the facts proved therein make out a case would create a legal liability against the state, were the same established in evidence in a court of justice against an individual or corporation; but the superintendent of public works may make settlement of any such claim in any case where the amount thereof does not exceed the sum of five hundred dollars, but no such settlement shall be effective against the state

until the same has been approved by the attorney-general and the canal board; provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals.

“ Neither the comptroller nor the commissioner of the canal fund shall pay any damages awarded, or the amount of any commutations agreed on for the appropriation of land or water, or for the erection of a farm bridge, until a satisfactory abstract or title and certificate of search as to incumbrances is furnished, showing the person demanding such damages or commutations to be legally entitled thereto, which abstract and search shall be filed in the office of the comptroller.”

Under Sections 263-284 of our Code of Civil Procedure the remedies provided are fully set forth. Yet, construing our municipal law, our Court of last resort has held that these procedural provisions must be supplemented by a distinct statutory declaration of liability as well. The mere provision for a remedy is not enough. *Smith v. The State of New York*, 227 N. Y. 405. *Litchfield v. Bond*, 186 N. Y. 66.

We, therefore, submit that if there is any obscurity as to the liability of the State as compared with that of Mr. Walsh, officially or personally, it arises from the fact that the ultimate wrongdoer has not conceded its liability and provided a remedy. This failure of our adjective and substantive law does not, however, shift the blame in admiralty or in any other jurisdiction to the shoulders of a subordinate.

The liability of the State cannot be enforced or any remedy pursued against it until, under a law like that adopted by the United States for ad-

miralty causes, (*American Bar Association Bill, Act of March 9, 1920, printed in U. S. Compiled Statutes as Section 1251 $\frac{1}{4}$*) it makes a waiver and concession in favor of its claimants. *The Lake Monroe*, 250 U. S. 247. Nor may a Federal statute impose this liability and provide this remedy even under so broad and exclusive a construction of the jurisdiction of admiralty as in *Knickerbocker Ice Co. v. Stewart*, 252 U. S. —. There is no denial of any constitutional right to citizens or persons because a state has not assumed a liability or provided a remedy for damages, even in cases where it alone, if anyone, must respond. *Palmer v. Ohio*, 248 U. S. 32.

It follows that the "Koerber" and "Charlotte" causes differ from *United States v. Judge Peters*, 5 Cranch 115. There it was suggested that the State was the owner of a fund proceeded against in a District Court of Admiralty. The fund was in the hands of its State Treasurer, but apparently had never been mingled with the general funds of the State; on the contrary, the officer had been indemnified to hold it for payment as the court might direct. Mandamus compelling Judge Peters to issue process enforcing his judgment against the fund was granted. Yet, this was done solely upon the theory that the State was not a party. See *Miller, Constitution*, page 42, etc., *Beveridge Life of Marshall*, Vol. IV, p. 18, etc.

These causes at bar come under the modern rule that the court will determine whether a state is the real party defendant from an examination

of the whole record. *In re Ayers*, 123 U. S. 443. That the state is the real party defendant is established under:

- Walsh v. Preston*, 109 U. S. 297.
- Hagood v. Southern*, 117 U. S. 52.
- Christian v. Atlantic N. C. Railroad Co.*, 133 U. S. 233.
- North Carolina v. Temple*, 134 U. S. 22.
- Pennoyer v. McConnaughy*, 140 U. S. 1.
- Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.
- Smith v. Reeves*, 178 U. S. 436.
- Murray v. Wilson Distilling Co.*, 213 U. S. 151.
- Lankford v. Platte Iron Works*, 235 U. S. 461.

The Claimants-Respondents in the Koerber and Charlotte causes are for the present in the situation of the owner in the case imagined in *The Arturo*, 6 Fed. 308, 313, where the learned judge said that even a ship stolen and operated by pirates to the injury of third parties would be liable *in rem* and subject to sale for damages. We, of course, deny that the analogy between a claim for immunity and piracy is perfect or complete.

In all seriousness and concluding our argument denying the obligation of Mr. Walsh and asserting the immunity of the State, we submit:

1. That within limitations the Claimant-Respondents are not without an adequate and secure remedy elsewhere against any servants of the

State who actually mismanaged the Koerber and Charlotte to the injury of the libelants;

2. That inasmuch as admiralty jurisdiction, under *Ex Parte Boyer*, 109 U. S. 629, and *Perry v. Haines*, 191 U. S. 17, extends to the canals, a denial of the relief we pray for here might transfer a major part of claims against the State of New York to a tribunal outside its jurisdiction.

IV

THE QUEEN CITY IS EXEMPT UNDER RULES OF COMITY.

In our verified suggestion of want of jurisdiction (ex parte 26, pages 14-17), we submit that at the time of the accident the Queen City was employed only for the governmental purposes of the State of New York in the operation and repair of the State canals and is now so used; that the Queen City is and was the absolute property of the State. The canals are free, the State deriving no direct profit from them (State Constitution, article 7, section 9). They have been an important agency of interstate commerce.

Mr. Justice Story in his commentaries on the Constitution said, as we have noted, that the question was an open one in 1833, as to whether a State vessel was suable in admiralty. Since that time all doubt has been resolved in favor of the exemption of such vessels.

At the time of the Confederation the exemption was held to apply to a ship of war belonging to a State (evidently South Carolina). *Moitez v. The South Carolina*, 17 Fed. Cases No. 9,697.

The principle is absolute as applied to vessels

used for governmental purposes by the United States or foreign governments. *L'Invincible*, 1 Wheat. 238; *Schooner Exchange v. McFaddon*, 7 Cranch, 116; *Long v. The Tampico*, 16 Fed. 491; *Tucker v. Alexandroff*, 183 U. S. 424; *The Parliament Belge*, 5 Probate Division (Eng.) 197. The exemption seems to rest upon convenience or international courtesy rather than upon any lack of power in the courts to enforce their process against the *res*. So in *The Siren*, 7 Wall. 152, where certain property involved in a maritime tort became subject to admiralty by the affirmative action of the United States, it was held that third parties might claim their damage out of it, although they might not satisfy their claim from the vessel itself.

We can perceive no reason why the same rule does not apply to a State vessel. The learned Judge below says in his opinion that the exemption has never been applied to a State owned vessel. He ignores the fact that the exemption has been applied to public property and to vessels used in a governmental capacity by municipalities in this country. In principle there can be no reason why the property of public corporations, which are subject to admiralty *in personam*, should be favored in the same way as that of United States and foreign governments, and that property of a state should occupy a peculiar and anomalous position before the courts of admiralty. *The Public Bath No. 13*, 61 Fed. 693; *Workman v. New York City*, etc., *supra*.

Where the United States libeled a vessel used by the state port of Portland, Oregon, for injuries done by the local vessel to a lighthouse tender

owned by the United States, it was held that since she was owned by the port and charged with the duty of improving and maintaining navigation in the harbor of Portland, she was exempt. *The John M'Cracken*, 145 Fed. 705. The same exemption was applied to a police boat owned and operated by the City of Boston in a governmental capacity. *The Protector*, 20 Fed. 207. An ice boat owned and operated by the City of Baltimore to free the harbor from ice and obstructions was granted the same exemption. *The F. C. Latrobe*, 28 Fed. 377. Where a tug was used by the City of New York for transporting prisoners and in charitable activities, the exemption was applied. *The Fidelity*, 8 Fed. Cases Nos. 4,757; 4,758; 4,759. See also *The Seneca*, 21 Fed. Cases No. 12,668, where a steamboat owned by the City of New York was held exempt.

The Chief Justice in *Workman v. New York City*, *supra*, shows how the practice may vary by consent etc. in different jurisdictions. It is clear, however, that public property is exempt from a suit *in rem* upon principles of comity and convenience.

Usually the remedy is for tort *in personam* against the public authority owning or operating the offending vessel. *Rogers v. Rajendro Dutt*, 13 Moore P. C. 209, 15 Reprint 78; *The Inflexible*, Swabey's Admiralty page 32; *The Swallow*, Swabey's Admiralty page 30.

It does not appear that the State in the Queen City or in the Koerber or Charlotte causes has adopted or ratified any wrongful act of its officers, servants or employees or that any property

is within the jurisdiction of the court that is not clearly entitled to exemption under the foregoing.

V

THE JUDGMENT OF THE COURT OF CLAIMS AS AFFIRMED BY THE APPELLATE DIVISION IS RES JUDICATA AS AGAINST THE CLAIM MADE IN ADMIRALTY ON ACCOUNT OF THE QUEEN CITY.

Perhaps, not much may be made of this point, since the record of proceedings in the Court of Claims of New York (*Ex Parte* 26, pages 17-27) is so ambiguous. The order (page 27) only states the conclusion that the claim does not state a cause of action, without specifying the grounds. This is not necessarily required under our practice. *Code of Civil Procedure*, sections 488, 490. The affidavit used on the motion to dismiss serves to clarify the matter to some extent (pages 25-26). It would be difficult to identify precisely the grounds of the courts' determination without the briefs of counsel in the Appellate Division and these are not before this court.

Of course, if the claim was dismissed upon the ground that the state has denied all liability for damages arising from the navigation of the canals, this would not control admiralty, if there is, despite our previous argument, jurisdiction there. If the claim was dismissed because the state's officers, outside the scope of their authority, used the tug for the entertainment of the picnic party, all would depend upon whether this rule is applicable in admiralty, if jurisdiction is found and under the authority of *The Workman case*, *supra*.

VI

PROHIBITION AND/OR MANDAMUS ARE THE PROPER REMEDIES.

In the Koerber and Charlotte causes the absence of jurisdiction of the person of the State of New York appears upon the face of the record proper. In the Queen City the lack of jurisdiction over the subject matter is presented by a verified suggestion of want of jurisdiction. Both questions may be properly taken by these means. *In re Baiz*, 135 U. S. 403, 430.

Our practice is based upon *The Lake Monroe*, 250 U. S. 246, and the application is made under Section 234 of the Judicial Code.

The question presented is not whether a libellant *can recover* in the suit he has begun, but whether he can go into a court of admiralty to have his rights determined. *Ex parte Gordon*, 104 U. S. 515, 516.

The writ is not discretionary where the want of jurisdiction appears upon the face of the record proper either as to the person or the subject matter. *Re Cooper*, 143 U. S. 472, 495, 505. The case at bar differs from *Re Massachusetts*, 197 U. S. 482, since the State is the real party in interest and the learned district Judge so treats it in his opinion. *Palmer v. Ohio*, 248 U. S. 32.

The objection being to the jurisdiction of the person in the Charlotte and Koerber causes, it seems, that if we appear generally and plead now in the District Court, our right to raise the

question again may be lost under *Porto Rico v. Ramos*, 232 U. S. 627.

CONCLUSION

The relief prayed for in both petitions should be granted.

Dated, Albany, N. Y., December 1, 1920.

Respectfully submitted,

CHARLES D. NEWTON,

Attorney-General of New York.

EDWARD G. GRIFFIN,

Deputy Attorney-General.

DEC 6 1920

JAMES D. WAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM 1920.

No. 25 ORIGINAL.

IN THE MATTER

OF

THE PETITION OF THE STATE OF NEW YORK,
THE PEOPLE OF THE STATE OF NEW
YORK, EDWARD S. WALSH, SUPERINTENDENT
OF PUBLIC WORKS OF THE STATE OF NEW YORK AND
EDWARD S. WALSH, INDIVIDUALLY AND PERSON-
ALLY, FOR A WRIT OF PROHIBITION AND/ OR A WRIT OF
MANDAMUS,

AGAINST

HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES WITHIN AND FOR THE WEST-
ERN DISTRICT OF NEW YORK, AND THE OFFICERS
OF SAID COURT.

BRIEF IN OPPOSITION TO THE PETITION.

STANLEY & GIDLEY,
*Proctors for Hon. John R. Hazel,
United States District Judge,
Western District of New York.*

ELLIS H. GIDLEY,
Of Counsel.

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Other authorities cited.

| | | |
|--------------------------|-------------------|---|
| Benedict's Admiralty | 4th Ed. Sec. 128 | 2 |
| Black's Law Dictionary | | 3 |
| Hall, International Law, | 6 Ed. p. 161 | 2 |
| Story, Commentaries | Sec. 1683, Vol. 3 | 2 |

Supreme Court of the United States

OCTOBER TERM 1920.

No. 25 ORIGINAL.

IN THE MATTER

OF

THE PETITION OF THE STATE OF NEW YORK,
THE PEOPLE OF THE STATE OF NEW
YORK, EDWARD S. WALSH, SUPERINTENDENT
OF PUBLIC WORKS OF THE STATE OF NEW YORK AND
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ALLY, FOR A WRIT OF PROHIBITION AND/ OR A WRIT OF
MANDAMUS,

AGAINST

HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES WITHIN AND FOR THE WEST-
ERN DISTRICT OF NEW YORK, AND THE OFFICERS
OF SAID COURT.

BRIEF IN OPPOSITION TO THE PETITION.

Statement of the Case.

Libellants, acting either as bailees or owners, filed three separate libels *in rem* in the United States District Court within and for the Western District of New

York. One libel was filed against the Steam Tug "*Henry Koerber, Jr.*", her boilers, engines, tackle, apparel and furniture, on the fifteenth day of April, 1920, by Murray Transportation Company, Bailee of United States Navy Coal Barge No. 483, in a cause of collision, to recover for damages alleged to have been received by said coal barge while being navigated on the Erie Canal in tow of the Tug "*Henry Koerber, Jr.*". The two remaining libels were filed against the Steam Tug "*Charlotte*", her engines, boilers, machinery, boats, tackle, apparel and furniture, on the fifth day of February, 1920, by George Wagner and William J. Dolloff respectively, in causes of collision, to severally recover for damages alleged to have been received by canal-boats owned by the respective libellants while being navigated on the Erie Canal in tow of the Tug "*Charlotte*."

The prayer of each of said libels sought the issuance of process for the *seizure* and *arrest* of the respective tugs "*Henry Koerber, Jr.*", and "*Charlotte*". Process was issued thereon in the usual course and was duly served in the cause against the "*Henry Koerber, Jr.*". A satisfactory stipulation for release from arrest of the "*Henry Koerber, Jr.*", and like stipulations in lieu of arrest of the "*Charlotte*", together with verified *claims* to the *res* in each case, were then filed in said District Court by Frank F. Fix and Charles Fix doing business under the name and Style of Fix Brothers, of Buffalo, New York, as *claimants* thereto, and the vessels were thereupon released by the Marshal.

On June 8, 1920, said claimants filed their answer in the cause against the "*Henry Koerber, Jr.*", and on

June 12, 1920, they likewise filed their answers in the respective causes against the "*Charlotte*". At the same time claimants of the respective tugs likewise filed with the District Court their respective verified petitions, in each case, under Rule Fifty-nine (59) of the Admiralty Rules of Practice For The Courts of the United States, together with their respective stipulations for costs conformably to the said Rule. The several petitions contain allegations that, in each cause, at the time of the respective disasters and damage complained of, the Steam Tugs, "*Henry Koerber, Jr.*", and "*Charlotte*" were under charter by the owners, said claimants, to Edward S. Walsh, Superintendent of Public Works of the State of New York, who had entered into such charter parties under authority reposed in him by virtue of an Act of Legislature of the State of New York; and that, at the time of the respective disasters complained of, said respective Steam Tugs "*Henry Koerber, Jr.*" and "*Charlotte*" were, by virtue of said charters, solely under the operation, control, direction and management of said Superintendent of Public Works. The facts of the respective actions *in rem* were therein recited and it was further alleged that if decrees should be found and ordered in the respective causes against the "*Henry Koerber, Jr.*" and "*Charlotte*", then petitioners, for the faults alleged in the libels, by virtue of their ownership of said vessels, would become liable for the payment of the same and would be mulcted in damages for the disasters, to which they were total strangers and concerning which they had no control, direction or participation; and that by reason of the facts as alleged, Ed-

ward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in the same suits for such damage, in accordance with the provisions of Rule Fifty-nine (59) of the Admiralty Rules. It was also therein alleged that in the event of the ordering of decrees against said *vessels* for the damages complained of, that *petitioners would be unable, by operation of law, to recoup their loss thereon by appropriate action against the Superintendent of Public Works or the People of the State of New York and that petitioners would be compelled thereby to sustain a considerable pecuniary loss for damages, for which they were in no way liable, and toward which they did not contribute by any act or omission whatsoever.*

The petitions contain further allegations as to the existence of property used and controlled by the Superintendent of Public Works located within the Western District of New York. Appropriate prayer for the issuance of process was added thereto. Upon each petition Hon. John R. Hazel, United States District Judge in and for the Western District of New York, made and entered formal orders in the respective causes directing that process conformably to the course and practice in cases of admiralty and maritime jurisdiction and as provided by Admiralty Rule Fifty-nine (59), issue against Edward S. Walsh, Superintendent of Public Works of the State of New York, and in case he cannot be found then that the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for. Such process citing said Superintendent of Public Works to appear

and answer was duly issued in the respective actions and was *duly served upon Edward S. Walsh personally* by the United States Marshal *within the Western District of New York* on the 19th day of July, 1920.

Upon the adjourned return day, September 7, 1920, upon the call of the calendar in open court, Hon. Chas. D. Newton, Attorney General of the State of New York, by Edward G. Griffin, Deputy Attorney General, appeared before the court and *orally* entered his special appearance as proctor on behalf of the State of New York, the People of the State of New York, the Superintendent of Public Works of the State of New York, and Edward S. Walsh, and *orally* moved the District Court for an order withdrawing the monitions theretofore issued and dismissing the proceedings under Rule Fifty-nine (59) as against the Superintendent of Public Works, upon the ground that the District Court was without jurisdiction of the person or the subject matter so far as the Superintendent of Public Works of the State of New York was concerned. Objection thereto was orally made by proctors for petitioners and argument was heard thereon by the District Judge. Briefs on the law were submitted and on September 25, 1920, the written decision of the District Court was filed denying in all things the motion of the Attorney General of the State of New York. Subsequently and on October 8th, 1920, an order was entered, conformably to such decision, denying the motion of the Attorney General in all things, with costs, upon the ground stated in the opinion. On the same day the Attorney General procured an order from the District Court permitting a written *suggestion of want*

of jurisdiction made by the Attorney General to be filed *nunc pro tunc* as of September 7th, 1920. This suggestion is upon the ground that the joinder of Edward S. Walsh, Superintendent of Public Works of the State of New York, as a party respondent therein, constitutes suits, cases, controversies and causes against the State of New York, in which the State of New York has not consented to be sued here or in any other place; that the District Court is therefore without jurisdiction of the subject matter set up in the foregoing petitions, orders or monitions directly or by reference or of the person of Edward S. Walsh, Superintendent of Public Works of the State of New York.

Further action thereon was suspended by stipulation of proctors pending the result of the proceedings herein taken by petition to this court for writ of prohibition and/or mandamus.

Statement of Facts.

A. LEGISLATION.

The Legislature of the State of New York by the provisions of Chapter 264 of the Laws of 1919 of the State of New York enacted to be immediately effective "An Act to authorize the Superintendent of Public Works to provide towing facilities on the State Canals, and making an appropriation therefor," which Act is as follows:

"The People of the State of New York, represented in Senate and Assembly, do enact as follows: Section 1. The Superintendent of Public Works is hereby authorized to provide such facili-

ties as in his judgment may be necessary for the towing of boats on the canals of the state. Such towing service shall be furnished by the Superintendent of Public Works under such rules and regulations as he shall adopt, and he is hereby authorized and empowered to impose and collect for such towing service such fees as in his judgment may seem fair and reasonable, and will foster and encourage the use of the state canals for the transportation of freight. The tables of distances on file in the office of the Superintendent of Public Works shall be conclusive in computing distances on the canals. The moneys so collected shall be deposited in the state treasury by the Superintendent of Public Works, pursuant to the provisions of the State Finance Law.

2. For the purpose of carrying into effect the provisions of this act, the sum of two hundred thousand dollars (\$200,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable to the order of the Superintendent of Public Works by the treasurer, on the warrant of the Comptroller.

3. This act shall take effect immediately."

The above legislation was in full force and effect at the time the charters of the tugs were entered into by the Superintendent of Public Works, and at the time of the disasters complained of.

It was further enacted in Section 37 of the original Canal Law of 1894 of the State of New York, now Sec-

tion 47 of the Canal Law (Chapter 13, Laws 1909) as follows:

“47. Claims for damages.—There shall be allowed and paid to every person sustaining damages from the canals or from their use or management, or resulting or arising from the neglect or conduct of any officer of the state having charge thereof, or resulting or arising from any accident, or other matter or thing connected with the canals, the amount of such damages to be ascertained and determined by the proper action or proceedings before the Court of Claims; but no judgment shall be awarded by such court for any such damages in any case unless the facts proved therein make out a case which would create a legal liability against the state, were the same established in evidence in a Court of Justice against an individual or corporation; but the Superintendent of Public Works may make settlement of any such claim in any case where the amount thereof does not exceed the sum of five hundred dollars, but no such settlement shall be effective against the state until same has been approved by the attorney-general and the canal board; provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals.

Neither the Comptroller nor the commissioner of the canal fund shall pay any damages awarded, or the amount of any commutations agreed on for the appropriation of land or water, or for the

erection of a farm bridge, until a satisfactory abstract of title and certificate of search as to incumbrances is furnished, showing the person demanding such damages or commutations to be legally entitled thereto, which abstract and search shall be filed in the office of the Comptroller."

It will be observed that by virtue of such enactment the Court of Claims is specifically prohibited from consideration and determination of claims arising from damages resulting from the navigation of the canals.

B. STATUS OF THE STEAM TUGS "HENRY KOERBER, JR." AND "CHARLOTTE."

Following the enactment of Chapter 264 of the Laws of 1919 referred to, and on May 16, 1919, the People of the State of New York, through Edward S. Walsh, Superintendent of Public Works, entered into two written charter parties with Fix Brothers of Buffalo, New York, claimants herein, as owners of the Steam Tug boats "*Henry Koerber, Jr.*" and "*Charlotte*" respectively. The charter parties provided that the owners chartered and let said vessels respectively to the Superintendent of Public Works from May 15, 1919, to such date between November 15, 1919 and December 15, 1919, as might be determined by the Superintendent, for which said charter and use the Superintendent agreed to pay the owners the sum of Twenty (\$20.00) Dollars per day, together with all moneys actually and necessarily paid by the owners as wages to the crews manning said tugs; that said charter parties provided that the Superintendent should operate said vessels in such manner in such waters as he should

direct; that the crews employed on said tugs should be acceptable to the Superintendent and subject to immediate dismissal either by the owners upon the Superintendent's direction or by the Superintendent direct if he so elected; and that the Superintendent would furnish all fuel and supplies necessary for the operation of said tugs. The sole duty remaining upon the owners was that of maintaining the tugs and their machinery in proper and seaworthy condition. The tugs were immediately delivered over to the Superintendent of Public Works, and thereafter were engaged by him in towage of vessels upon the Erie Canal under the terms of the charter parties and were so engaged at the time of the disasters complained of.

That it is alleged in the libel against the "*Henry Koerber, Jr.*" that the "*Henry Koerber, Jr.*" in the month of October, 1919, was proceeding easterly along the Erie Canal towing United States Navy Coal Barge No. 483, in company with another barge, when the bow of Barge No. 483 came into contact with the south canal wall or bank at a point between Lock No. 4 and Lock No. 3, resulting in damage to the Barge No. 483, amounting to approximately Three Thousand (\$3,000.00) Dollars, for which amount libellant claims the right to recover.

That it is alleged in the libels against the "*Charlotte*", that the "*Charlotte*" on the 7th day of July, 1919, was proceeding westerly along the Erie Canal towing five canalboats, among them the "*John Monk*", the property of libellant George Wagner, and the "*Joseph Weed*" and "*Romayne*", the property of libellant William J. Dolloff, when the "*Joseph Weed*"

came into contact with the canal wall or abutment adjacent to the Indian Castle guard lock, resulting in damage to the boat "John Monk" in the sum of Nine-Hundred Ninety-five (\$995.00) Dollars, and to the boats "Joseph Weed" and "Romaine" in the sum of Eighteen Hundred Sixty-six and 32/100 (\$1866.32) Dollars, for which amounts libellants respectively claim the right to recover.

Brief of the Argument.

I. These causes are not proper subjects for the issuance of writs of prohibition and/or mandamus

II. The District Court possesses complete exclusive jurisdiction.

III. The Superintendent of Public Works of the State of New York is subject to the exercise of admiralty jurisdiction.

IV. Courts of Admiralty do not countenance depriving litigants of their proper remedy.

ARGUMENT.

I. These causes are not proper subjects for the issuance of writs of prohibition and/or mandamus.

The power vested in the United States Supreme Court to grant writs of prohibition and/or mandamus herein is established by Section 234 of the Judicial Code, Revised Statutes Section 688, which provides:

"The Supreme Court shall have power to issue writs of prohibition to the district courts when

proceeding as Courts of Admiralty and Maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States where a State, or an ambassador, or other public minister, or a ~~consul~~ ^{consul}, or vice-consul is a party."

1. THIS COURT HAS NOT GRANTED WRITS OF PROHIBITION WHEN PETITIONER POSSESSED ANOTHER REMEDY.

In commenting on Section 688, this court said with reference to the writ of prohibition provided therein, In *Re Ex Parte Cooper*, 143 U. S. 472:

"The writ thus provided for by Section 688 is the common law writ, which lies to a Court of Admiralty only when that court is acting in excess of, or is taking cognizance of matters not rising within its jurisdiction."

To the same effect also, See *Ex Parte Frederick Gordan*, 104 U. S. 515.

In the case of *Ex Parte New York & Porto Rico Steamship Co.*, 155 U. S. 523, where the precise question as to the right of the District Court to take and maintain jurisdiction of a charterer under Rule Fifty-nine (59), was presented for decision, being thus identical with the causes at bar, it was said in part in denying the writ (P. 531):

"In this instance, the District Court saw fit to adopt the practice, which would have obtained in

equity, of bringing all the parties in and trying the whole matter at once, and we are asked to prohibit that court from so proceeding on the ground of want of jurisdiction thus to implead the charterers.

We have recently thus stated the principles applicable to the issue of the writ of prohibition, In *Re Rice* ante, p. 396: "Where it appears that the court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith v. Whitney*, 116 U. S. 167, 173. *Ex Parte Cooper*, 143 U. S. 472, 495."

So in these causes, without reviewing the action of the District Court on its merits, it certainly cannot be said that that court was clearly without jurisdiction, or that petitioner was without other remedy, for in the event of a decree against him, he could appeal directly to this court on the question of jurisdiction, or

to the Circuit Court of Appeals upon the whole case, which court might then certify such question to this court for decision. See *Morrison vs. District Court of the United States*, 147 U. S. 14, 26; *United States v. Jahn*, 155 U. S. 109, 115.

We urge that these cases at bar are far from being cases in which it should be regarded as a proper exercise of discretion to interfere with the orderly progress of the suit below by means of the issuance of this writ. Rather, the District Court, having general jurisdiction over the subject matter and over the parties, should be allowed to proceed to decision upon the merits, and if error has been or shall be committed in entertaining the claimants' contention against the charterer in the same suit with the libel against the ship, it may be later corrected on appeal. See *Ex Parte Fassett*, 142 U. S. 479, 484; *Moran v. Sturges*, 154 U. S. 256, 286.

In *Ex Parte Frederick Gordon*, *supra*, it was held that, in a suit for damages for certain loss of life resulting from a vessel collision, the collision was certainly a subject of admiralty jurisdiction as likewise was the vessel, and that the District Court was competent to hear and decide the damages incurred, and that an appeal would lie from its decision. The writ was therefore denied.

In *Ex Parte Detroit River Ferry Company*, 104 U. S. 519, the foregoing decision was followed upon similar facts, and the writ denied, as was likewise the result in *Ex Parte Walter F. Hager*, 104 U. S. 520.

In non-admiralty causes where the writ of prohibition has been sought as a creature of the common law,

similar decisions have been reached and the doctrine as laid down in *In Re Rice*, 155 U. S. 396, reaffirmed.

We refer to the statements contained in the following opinions: *In Re Huguley Manufacturing Company, et al.*, 184 U. S. 297; *Alexander v. Crollott*, 199 U. S. 580; *In Re Ex Parte Oklahoma*, 220 U. S. 191. The opinion in the latter case, pages 208, 209, is particularly conclusive on the point.

Claimants therefore urge that the application for writs of prohibition in the causes at bar is not proper, and, in accordance with the prior decisions of this court, should not be granted for the reason that, having properly exercised its admiralty powers by means of its process duly issued and served conformably to the statute and the Admiralty Rules, and having general jurisdiction of the subject matter and the vessels, the District Court should be allowed to proceed to decision without interference; and if error be committed by it upon a hearing upon the merits, that there still remains in the petitioner the right of correction of the same by appeal.

United States v. Jahn, supra, page 115.

In Re Ex Parte Oklahoma, supra, pages 208, 209.

2. THIS COURT HAS NOT GRANTED WRITS OF MANDAMUS WHERE PETITIONER HAD OTHER REMEDY.

We direct attention to the language used by this court in its opinion denying a petition for a writ of

prohibition filed by the State of Oklahoma. *In Re Ex Parte Oklahoma*, 220 U. S. 191, 209.

“In view of the identity of the principles which govern the right to invoke the extraordinary remedy of mandamus to correct an unlawful assumption of jurisdiction, and those which control the power to issue the writ of prohibition for the same purpose, it was perhaps unnecessary to consider the subject from an original point of view, since the matter is settled by authority. Quite recently in *re Harding*, 219 U. S. 363, the whole subject was reviewed, and it was held that discretion to issue the writ of mandamus would not be exerted to review a question of jurisdiction where there was otherwise adequate remedy provided by statute for the review of errors in that respect, asserted to have been committed by a Trial Court.”

In *Re Harding, supra*, at page 369, the following was said:

“The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded. (See *Dowell v. Applegate*, 152 U. S. 327, 337 and cases cited) and has been so recently applied (*United States v. Hine v. Morse*, 218 U. S. 493) that it may be taken as elementary and requiring no further reference to authority.”

The decree here is interlocutory only and is not a final decree. A writ of error may not be had for the purpose of reviewing a decree, which is purely interlocutory. It has been held by this court in several different cases that mandamus cannot be used as a writ of error.

Morrison v. District Court of United States,
147 U. S. 14, 26.

Ex Parte Des Moines & M. R. Co., 103 U. S.
794, 796.

Ex Parte B. & O. R. Co., 108 U. S. 566.

Re Pennsylvania Co., 137 U. S. 451, 453.

In Re Rice, 155 U. S. 396, 403.

Ex Parte Union Steamboat Co., 178 U. S. 317,
319.

Re Atlantic City Railroad Co., 164 U. S. 633,
634.

Re Huguley Mfg. Co., 184 U. S. 297, 301.

Am. Construction Co. v. Jacksonville T. & K.
W. R. Co., 148 U. S. 372, 379.

Re Pollitz, 206 U. S. 323, 331.

Furthermore it has been held, as also in cases of petitions for writs of prohibition, that mandamus is never granted where the party asking it has another remedy.

Morrison v. District Court of the United
States, Supra.

Re Pennsylvania Co., Supra.

Ex Parte Union Steamboat Co., Supra.

Re Atlantic City Railroad Co., Supra.

Re Huguley Mfg. Co., Supra.

As has been pointed out in the preceding point relative to the power to issue writs of prohibition, in the event of the rendition of a final decree upon the merit against the petitioner, he is not without other and adequate remedy, for he could then appeal, either directly to this court, or upon the whole case, to the Circuit Court of Appeals. See *Morrison v. District Court of United States*, *supra*; *United States v. Jahn*, 155 U. S. 109, 115; In *Re Ex Parte Oklahoma*, *supra*.

Moreover, the plain effect of these applications is to seek to direct the District Court for the Western District of New York to decide this question in a particular way, and such has been distinctly said was not the office of the writ of mandamus. See *Morrison v. District Court of United States*, *supra*; citing *Ex Parte Morgan*, 114 U. S. 174, *Ex Parte Brown*, 116 U. S. 401; also In *Re Rice*, *supra*; *Re Pollitz*, *supra*.

It is urged therefore that the application for writs of mandamus in the causes at bar is not proper, and should not be granted under the authority of the prior decisions of this court.

3. QUESTIONS OF JURISDICTION HERE SHOULD NOT BE RAISED BY EXCEPTIONS TO THE LABEL OR PLEA ON THE MERITS.

The basic contention of the Attorney General of the State of New York, as disclosed by the suggestion and brief filed, and oral argument made, in the court below, is that the District Court is without jurisdiction because these causes constitute actions brought against the State of New York in which the State of New York has not consented to be sued. Upon that contention, it

follows as of course, *that the precise inquiry becomes that of whether or not these causes constitute actions against the State of New York.*

That such question is one which belongs to the merits rather than to the jurisdiction, and is more properly the subject of demurrer or plea rather than of a motion to dismiss was flatly held by this court in *Scully v. Bird*, 209 U. S. 481, in which its prior decision of *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28, was reaffirmed and the language of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat, 738, 856, in connection therewith again cited with approval. In both *Scully v. Bird*, and *Illinois Central Railroad Co. v. Adams*, the precise ground for the dismissal of the bill in the court below was want of jurisdiction upon the ground that the suit was in effect a suit against a state, the party named as defendant in each cause being a state officer.

So here the benefits of Rule Fifty-nine are properly sought by the claimants against the individual who, as Superintendent of Public Works chartered their craft and exercised dominion over them at the time of the disasters complained of. It is therefore urged under the rule of the foregoing cases, that the important question raised by the Superintendent of Public Works, viz: that these causes constitute suits against the State of New York, is one, *not of jurisdiction*, but rather whether in the exercise of its jurisdiction, the District Court ought to make a decree against him who is brought in by the application of the Fifty-ninth Rule, and that such question should therefore be raised either by exceptions to the libel or plea on the merits.

and not made the subject of a motion to dismiss the proceedings upon a special appearance for that purpose alone. We shall show that the District Court has complete jurisdiction so that petitioners' question becomes one properly for the merits.

4. THE SUGGESTIONS FILED BY THE ATTORNEY GENERAL OF NEW YORK ARE NOT COMPETENT EVIDENCE.

It was long since laid down as the rule that he who claimed exemption from the ordinary process of the court carried the burden of proof to sustain his defense by competent evidence.

Long vs. The Tampico, 16 Fed. Rep. 491.

It is freely conceded that the principle has obtained in the case of a friendly foreign sovereign to accord respect to a suggestion of immunity made by the accredited representative of such sovereign and to recognize the facts therein stated as to the status of a vessel belonging to such sovereign as being conclusive.

Tucker vs. Alexandroff, 183 U. S. 424, 441.

This practice has obtained because the matters contained in such suggestion would not be justiciable by our courts, and the admission of such suggestion as proof is a matter of courtesy (Hall, International Law, 6 Ed. p. 161).

This principle does not, however, obtain in cases of vessels belonging to the United States proceeded against in our own courts, and suggestions of immunity in such cases will be disregarded unless they are

assented to or supported by the customary legal evidence, such matters being justiciable by our courts.

In *South Carolina v. Wesley*, 155 U. S. 542, where the Attorney General of South Carolina filed a suggestion as to the title of certain lands involved in the action, this court said:

“In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. *U. S. v. Peters*, 5 Cranch, 115; *The Exchange v. McFaddon*, 7 Cranch, 116; *Osborn v. Bank of United States*, 9 Wheat, 738; *United States vs. Lee*, 106 U. S. 196; *Stanley v. Schwalby*, 147 U. S. 508.”

Here the Attorney General has wholly failed to furnish legal proof of any description concerning the allegations contained in his suggestions, and boldly demands the most stringent and drastic relief without in any manner giving proof as to the necessity or propriety thereof. The facts stated by proctors at the hearing before the District Court, as to the issue later presented in the form of the written suggestion, were stated and traversed orally and informally by proctors for both parties merely for the benefit of the court upon such hearing. No proof of any kind was adduced. It is urged therefore that writs should not be granted upon the mere suggestion as filed.

II. The District Court possesses complete exclusive jurisdiction of these causes.

1. THE JUDICIAL POWER OF THE UNITED STATES EXTENDS TO ALL CASES OF ADMIRALTY AND MARITIME JURISDICTION.

The fundamental law of the land establishes, that the judicial power of the United States of America extends, among other specific provisions therein, "to all cases of admiralty and maritime jurisdiction."

Constitution, Article 3, Section 2.

That the whole jurisdiction of the admiralty rests directly upon such grant has been too often set down as the basis for decisions by this court to require further citation here.

2. CASES OF ADMIRALTY AND MARITIME JURISDICTION HAVE BEEN COMMITTED TO THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE DISTRICT COURT.

Congress acting in accordance with the provisions of the Constitution not only provided that the District Courts shall have original jurisdiction of all civil causes of admiralty and maritime jurisdiction (Revised Statutes, Section 563, Judicial Code, Section 24, (3)) but has further enacted in Revised Statutes, Section 711, Judicial Code Section 256 as follows:

“The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”

This provision granting exclusive jurisdiction has been many times construed and discussed and has been uniformly recognized by this court. Interesting discussions of the various applications of the statute with relation to the maintenance of the exclusive character are to be found in the opinions in *The Moses Taylor*, 4 Wall, 411; *The Ad Hine v. Trevor*, 4 Wall 555; *The Belfast*, 7 Wall, 624. *The Glide*, 167 U. S. 606.

It should be said in this consideration, that the clause contained in the Statute saving the right of a common law remedy, where the common law is competent to give it, is not to be considered or applied here in any capacity whatever, as these are causes, by their very nature, pure actions *in rem* and are, as such, *sui generis*, distinctly admiralty remedies, not known to the common law. See *Benedict's Admiralty*, 4th Ed. Sec. 128.

3. CAUSES OF COLLISION ARISING UPON NAVIGABLE WATERS CREATE MARITIME LIENS WHICH ARE SUBJECTS OF ADMIRALTY JURISDICTION.

It has been several times held by this court following the decision in the English case of *The Bold Buccleugh*, 7 Moore P. C. C. 267, that a claim for damages by collision between two ships creates a maritime lien, as soon as the claim comes into being a *jus in re*, to be afterward enforced in admiralty by process *in rem*.

The *John G. Stevens*, 170 U. S. 113, 117 and cases there cited.

It was decided in *The Belfast*, 7 Wall, 624, that locality is the true test of admiralty cognizance in all cases of marine torts, and if it appears, as in cases of collision, that the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty.

The *John G. Stevens*, *supra*, at page 125, also refers with approval to the decisions of this court holding that suits by the owner of a tow against her tug to recover for an injury to the tow by negligence on the part of the tug are suits *ex delicto* and bear essential likeness to ordinary collision causes.

Concededly, the waters of the Erie Canal upon which the damages complained of occurred are public navigable waters of the United States.

The Robert W. Parsons, 191 U. S. 17.

It is contended therefore that the causes at bar, being denominated in the respective libels as causes of collision, civil and maritime, and being causes in which without question the remedy sought is sought against the *res* for maritime torts which created a *jus in re*, are distinctly subjects of the admiralty jurisdiction, and,

as such, within the complete original and exclusive jurisdiction of the District Court in causes of admiralty and maritime jurisdiction.

III. The Superintendent of Public Works of the State of New York is subject to the exercise of admiralty jurisdiction.

The District Court unquestionably has control of the *res*, as the "*Henry Koerber, Jr.*" and the "*Charlotte*" were within the territorial jurisdiction of the court when arrested upon its process. They were subject to maritime liens in favor of the respective libellants. Likewise the Superintendent of Public Works of the State of New York, was within the territorial jurisdiction of the court when its process, issued conformably to Rule Fifty-nine (59), was served personally upon him at Buffalo, New York. Moreover, it was alleged in the petitions filed by claimants that the Superintendent of Public Works had and maintained various property under his control and direction within the Western District of New York. Therefore the only question remaining to be determined is, whether, having such control of the subject matter, vessels and parties by due and proper exercise of its admiralty process, the District Court might also exercise its admiralty jurisdiction against the Superintendent of Public Works as such.

1. THE APPLICATION OF THE PROVISIONS OF THE FIFTY-NINTH RULE TO THESE CAUSES DOES NOT CHANGE THEIR ADMIRALTY CHARACTERISTICS AND DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION.

We shall hereafter show how immunity from admiralty process does not apply here; how the State may not impose its local law upon the admiralty jurisdiction, how, as between the owner and the charterer of these craft, the liability for disaster must lie with the charterer; and how the State must be presumed to have embarked upon this maritime enterprise in contemplation of the system of maritime law under which the charters were made.

It was claimed by the Attorney General below, and, as we understand it, is now likewise claimed that, these proceedings are not *in rem* and that there is no jurisdiction in the District Court to entertain a cause *in personam* against a State. We had not thought that the Attorney General would persist in this fallacious argument which was so completely answered by the District Judge.

The Attorney General still asserts that these causes do not constitute proceedings *in rem*. The facts are that in each of these causes the admiralty court properly and duly became in possession of the *res* proceeded against by the respective libellants. The proceedings became therefore pure actions *in rem, sui generis*, distinctly maritime in nature, and we submit that the contrary assertion is neither based on fact or supported by law.

Having set forth such assertion, the Attorney General argues that inasmuch as the *res* are not now under charter to, or in the possession of, the State, there is no basis in such proceedings against the property of a stranger for a claim *in personam* against the State. It should be sufficient reply to say that such argument

neglects not only the creation by disaster of a *jus in re* enforceable in admiralty by process *in rem*. The John G. Stevens, 170 U. S. 113, 117, and cases cited; but such argument likewise takes no thought of the liability of the charterer to return the vessel to the owner free from lien. The Barnstable, 181 U. S. 464.

The argument of the Attorney General then proceeds to the contention that no claim can exist *in personam* against the State by reason of the limitation of the Eleventh Amendment. We direct our answer thereto first upon the proposition that these are not, under any consideration, actions at law or in equity falling within the purview of the language of the Eleventh Amendment. Admiralty suits are neither suits at law or in equity, but are spoken of in contradistinction to both. Story, Commentaries on The Constitution, Section 1683, Vol. 3, Original Edition. Admiralty actions are *sui generis*, distinct in character and are not within the term civil suits thereby meaning suits of a civil nature at common law or in equity. United States v. Bright, Federal Cases 14,647, Atkins v. Fiber Disintegrating Co. 18 Wall. 272.

Secondly, we contend that the prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. Workman v. Mayor, etc., 179 U. S. 552, 573. Further, a libel *in personam* may be maintained for any cause within the jurisdiction of an Admiralty Court, wherever a monition can be served upon the libelee or an attachment made of any personal property or credits of his. Re Louisville Underwriters 134 U. S. 488, 490. Such was duly done in these causes.

The Attorney General cites in support of his theory the cases of *The Governor of Georgia v. Juan Madrazo*, 1 Pet. 110, and *Ex Parte Juan Madrazo*, 7 Pet. 627. We submit that neither case is applicable here for in the first named cause Chief Justice Marshall held that because the *res* was not in the possession of the court, it must be treated as a proceeding *in personam* to recover State moneys and therefore a suit against the State, at that time for the original jurisdiction of the Supreme Court. In the later case, he said flatly that the cause was not one where the *res* was in the custody of the Court of Admiralty or brought within its jurisdiction and was not for that reason one for the exercise of such jurisdiction; but that the cause became a mere personal suit to recover proceeds in the possession of the State. We also again submit in this connection that the assumption of the Attorney General that these proceedings are suits against the State of New York is a question which belongs to the merits rather than to the jurisdiction. *Scully v. Bird*, 209 U. S. 481.

The doctrine laid down by this court in the case of *Workman v. Mayor*, *supra*, is wholly decisive of the issue here, for no distinction in the applicability of the rule there laid down was made between corporations, municipal or sovereign; the national government alone was excepted therefrom. This doctrine is completely and succinctly stated with reference to the causes at bar and is fully referred to in the following points:

2. THE REASONS WHICH HAVE INDUCED COURTS OF ADMIRALTY TO GRANT IMMUNITY FROM PROCESS HAVE NO APPLICATION HERE.

The claim of the Attorney General of the State of New York, as set forth in his written suggestion, is that these actions constitute suits against the State of New York. This proposition is not conceded, but on the contrary claimants emphatically maintain that such is not true and is not substantiated by the record now before the court; and further that, in any event, the question whether these actions are against the State of New York or not, is one which belongs to the *merits rather than to the jurisdiction*, as is so distinctly the rule as expressed in *Scully v. Bird, supra* and *Illinois Central Railroad Company v. Adams, supra*, referred to and cited under Point I.—2.

Nevertheless, *while not conceding such claim* of the Attorney General, it is thought necessary to here consider the basis thereof and its cogency to the issue at bar.

The position taken by the Attorney General in his suggestion and as orally urged by him upon the District Court, has its basis without doubt in the theory that the State, being a sovereign body, may not be sued without its consent. That such is the time honored rule we freely admit. We shall endeavor to show, however, that in these causes at bar, there exists no reason, either based on principle or recognized by justice, for the granting of immunity from admiralty process or jurisdiction upon the ground of sovereignty of the State of New York, which is the obvious corollary to the proposition advanced and claimed by the Attorney General of the State of New York.

The cases in which immunity from process has been heretofore claimed and granted on the ground of

sovereignty have no application here for two reasons. First, they are, as far as our examination discloses, actions brought directly against vessels owned or maintained as the property of a sovereign power and at the time of action possessed by it or maintained under its control. In other words the sovereign has necessarily been, by virtue of ownership, the claimant of the vessel or such in effect. Such is distinctly not the case here. Secondly, those cases in which immunity from process upon the ground of sovereignty has been granted are cases either (a) of vessels in the possession of the National Government or (b) vessels of a friendly foreign sovereign.

The principle of immunity granted to vessels in the possession of the National Government was first declared by this court in *The Siren*, 7 Wall, 153, and again in *The Davis*, 10 Wall, 15. Both of those cases while laying down the principle upon which such immunity from process is based; i. e. recognition of sovereignty, nevertheless held that the liens in question were capable of enforcement therein because the *possession* of the Government was not disturbed in so doing. In the case of *Workman v. Mayor, etc., of New York*, 179 U. S., 552, 573, the present Chief Justice, in his opinion, thus sets forth the rule which recognizes the exception as to vessels of the National Government:

“Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government a ship, by

whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. The *John G. Stevens*, 170 U. S. 113, 120 and cases cited, 122."

The precise statement of this rule recognizing such exception contained in the leading case of *The Siren*, *supra*, p. 155, is worthy of quotation here:

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

The further principle of granting of immunity from process to vessels of a friendly foreign sovereign power apparently has its basis in the decision of *The Exchange*, 7 Cranch, 116, in which it was held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of the admiralty court, such privilege being based upon international courtesy. Recent cases occurring during the period of the World War have for the basis of their decision granting immunity from

process of the admiralty court, this observation of the principle of international courtesy, coupled with a desire to refrain from doing anything that would affect the dignity of a friendly sovereign, or strain the amicable relations existing between the two countries.

See *The Maipo*, 252 Fed. 627.

The Roseric, 254 Fed. 154.

The Pampa, 245 Fed. 137.

Nowhere through the various cases which deal with this question of immunity is there to be found a syllable which suggests that the courtesy accorded vessels of the national government or of a friendly foreign sovereign power can by any process of reasoning, be extended to include one of the several States of the United States. If it should be thought that such doctrine should perhaps be so extended, it, nevertheless, could not be extended upon the authority of the cases granting such immunity to vessels of the national government, for that privilege is, by virtue of the very authorities establishing it, granted only where *the actual possession* of the national government *was to be disturbed*; *The Davis*, *supra*. Here there is no possession of the *res* by the State or by a State officer which was or could be disturbed by these proceedings *in rem*. Nor could such privilege be extended upon the theory of the authorities granting immunity to vessels of a foreign sovereign, for the reason that the *res*, now in possession of the court, *were not*, at the time of taking such possession, either *owned, maintained or possessed* by the State of New York, by reason of the fact that the

respective charter parties had by their terms expired in December, 1919.

Moreover, a further decisive objection to the propriety of the extension of this privilege to the case of the State of New York, lies in the absence of complete sovereignty in the State of New York. *Sovereignty in its essence means supreme political authority.* Black's Law Dictionary. The sovereignty of one of the several States of the United States is not supreme or paramount in its control of the agencies of government for such sovereignty concededly can only comprise those elements which remain in it, as a political body, following the delegation of powers by the several States to the United States and the further prohibition by the United States of those powers which are to be exercised by it alone. Such State sovereignty is not complete or paramount—it can be only partial. In the light of the express prohibition contained in Section 10 of Article 1 of the Federal Constitution upon the exercise by a State of numerous and varied powers therein recited, all of which powers must be conceded to be commonly incident to the quality of sovereignty, it surely should not be determined that one of the several States of the United States possesses other than partial sovereignty. The right to make treaties, to coin money, to pay and collect taxes, to engage in war, are all so distinctly elements of that supreme and paramount political authority which is denominated "sovereignty," that when divested of such powers a political body fails to function as a sovereign. So it is with the State of New York.

It is therefore urged that no reason which has heretofore induced the granting of immunity from admiralty jurisdiction applies to the causes at bar.

3. THE STATE OF NEW YORK MAY NOT IMPOSE ITS LOCAL LAW UPON THE ADMIRALTY JURISDICTION.

We believe it must be conceded that the judicial power with reference to the administration of maritime rights is vested in the courts of the United States, as is expressed by Article 3, Section 2, of the Constitution. Accepting that premise, the question at issue becomes largely the same as that stated by the present Chief Justice in *Workman v. Mayor, etc.*, of New York, 179 U. S., 552, at page 557 as follows:

“Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decision therein. And this, not because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property, it is considered, by the local decisions, that the wrongdoer is endowed with all the at-

tributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted”.

Such is precisely what the State of New York is seeking in the decision of the present application—a holding that notwithstanding the power of the District Court as a Court of Admiralty to afford redress for the injuries here alleged because of its jurisdiction over the subject matter and vessels; nevertheless such remedy and relief as has been sought by claimant’s conformably to the rule must be denied them by reason of the assumed attributes of sovereignty with which the State claims to have endowed itself.

The answer to the proposition advanced by the State of New York is so ably expounded in the present Chief Justice’s opinion in the *Workman* case, *supra*, at pages 558, to 564, that we desire to specially direct the attention of the court again thereto, without however quoting from the same here at length. There the right of libellant to recover damages against the Mayor and other officers of the City *in personam* for injuries resulting from collision of his vessel with a fire boat of the municipality was upheld upon the broad general ground, as we read the decision, that otherwise there would result the practical destruction of a uniform maritime law and a resultant denial of justice if cognizance was given to the premise so advanced. It should be sufficient in fastening the ap-

plicability of this decision upon the matters at bar to further call attention to the fact that the prevailing opinion at page 572 appears to flatly hold *that the theory of sovereign attribute does not control the maritime law and cannot justify an Admiralty Court in refusing to redress a wrong where it has jurisdiction to do so.* So here not only would the granting of the State's application result in the destruction of the uniformity and symmetry of the maritime law as such, but perhaps, as more important to claimants, would result in a denial of justice to claimants, who have concededly sought the relief afforded by Courts of Admiralty conformably to its rules and practice; and that claimants as a result would be left without remedy to recoup such financial loss by reason of the disasters ~~as~~ may be decreed against them in favor of the libellants.

To the same effect as the Workman opinion was the opinion of Mr. Justice McReynolds in *Southern Pacific Company v. Jensen*, 244 U. S., 205, at page 215, in stating the now accepted settled doctrine of this court:

“And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction”.

In discussing the proposition of the power of a State to modify or change the general admiralty law by legislation, it was said at page 216:

“And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotation from *The Lottawanna*.”

The latter decision reported *sub nom* *Rodd v. Heartt* (*The Lottawanna*) 21 Wall, 558, contains a precise statement, by Mr. Justice Bradley, of the intention of the founders of the Constitution to provide and maintain a uniform system of maritime law, countrywide in its scope, uniform and consistent in its application, the rules and limits of which shall not be under “the disposal and regulation of the several states”. This statement has been many times referred to and set forth in decisions of this court upon questions of the extent and scope of and limitations upon admiralty and maritime jurisdiction and may perhaps be well regarded as the basis of the doctrine which now obtains in all such cases.

See also Union Fish Company v. Erickson,
248 U. S., 308.

4. AS BETWEEN THE OWNERS AND THE CHARTERER, LIABILITY FOR DAMAGE CAUSED BY NEGLIGENCE OF THE OFFICERS AND CREW UNDER THE DOMINION OF THE CHARTERER RESTS WITH THE CHARTERER.

The Attorney General in his brief filed with the District Court urged, among other things, that the doctrine of respondeat superior is not known to the admiralty and argues therefrom that Mr. Walsh, the Superintendent of Public Works, is not personally, aside from his official capacity, responsible for the negligence of those appointed by him and who operated the vessels at the time of disaster. We believe that the decision in the Workman case, *supra*, put an end to any doubt as to the applicability of the doctrine. At all event, it would now seem that such argument was puerile, for in the eyes of the admiralty, it makes little difference whether Mr. Walsh be considered responsible personally for the acts of negligence committed, or responsible therefor in his official capacity as Superintendent of Public Works of the State of New York. The essential fact remains that he was the charterer of the vessels and became liable as such, under the authority of *The Barnstable* 181 U. S., 464, where it was held "there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from

any lien of their own contracting, or caused by their own fault". The Barnstable holds flatly therefore that, where, as here, collision damage occurred while the vessel was under charter, such damage being due to the negligence of the officers and crew under the dominion of and paid by the charterer, *that the primary liability for such damage rests upon the charterer, and the owner has the right therefore under Rule 59 to call in the charterer to show cause why he should not be condemned for the loss resulting therefrom.*

5. THE STATE OF NEW YORK MUST BE PRESUMED TO HAVE CONTEMPLATED THE SYSTEM OF MARITIME LAW UNDER WHICH THE CHARTERS WERE MADE.

The Superintendent of Public Works concededly must have entered into the charter parties of the "HENRY KOERBER, JR" and "CHARLOTTE" by virtue of the authority given by the legislative enactment known as Chapter 264 of the Laws of 1919 of the State of New York. That act authorized him to engage in the business of towing craft upon the canals of the State, to provide facilities and to collect fees therefor, precisely the same as if any individual, firm or corporation had engaged in the like business of towing vessels upon the canals for profit. Being so authorized to act and having thereafter entered into charter parties of these craft with the owners thereof, the performance of those charter parties is to be regulated by the law which Mr. Walsh must be pre-

sumed to have had in mind when he executed the charter parties, and that law, as we have shown, is the general maritime law, uniform in its application and countrywide in its scope, which may not be limited or controlled in its exercise by the laws or regulations of the several states.

See Watts v. Camors, 115 U. S., 353, 362.

Union Fish Co. v. Erickson, 248 U. S., 308
313.

Further the Superintendent of Public Works must be presumed to have had in view the possibility of disaster occurring during the term of the charter parties when he entered into them and proceeded through their agency with the business of towing craft upon the canals of the State for profit. There are but two results of such possible disasters which he, as a reasonable man, could have contemplated, viz: either that he was bound in operating the vessels of claimants under such charter parties, by the rules of the general maritime law, and, upon the occurrence of disaster creating a lien against said vessels while in his custody, he would become liable therefor, as charterer, in accordance with such rules; or else that he did not regard himself as so bound or as liable as charterer thereof under the general maritime law, but instead contemplated and anticipated the exclusion of any lien or claim for damages occurring during the life of the charter parties, arising from the negligence of himself or his agents in the operation of these craft. Such belief, if indulged in, would neces-

sarily be relied on by virtue of the enactment of the Legislature expressly denying to the Court of Claims of the State of New York jurisdiction to consider claims arising from damages resulting from the navigation of the canals, (Barge Canal Law, Section 47), as well as by virtue of the decision of the Court of Appeals of the State of New York, in *Smith vs. State*, 227 N. Y., 405, wherein it was held, on an appeal from a judgment of the Court of Claims in an action to recover for personal injuries received upon the State Reservation at Niagara Falls, that the State was immune from liability for the torts of its officers. There is no other or middle course which he might have had in mind. If he regarded himself as liable for such damages as charterer under the general maritime law, he still remains liable by reason thereof. If on the other hand, he regarded himself as being exempt from liability as charterer, due to the enactment of that section of the Barge Canal Law referred to, coupled with the prohibition against a person suffering damage from suing the State as such, it, nevertheless, can avail him nothing, for the reason that his liability is not to be determined here by the provisions of the local law but rather, as we have shown, by the general maritime law which is not to be subjected to emasculation by the local law or regulation of any particular State.

IV. Courts of Admiralty do not countenance depriving litigants of their proper remedy.

1. JUSTICE COMMENDS THE UNLIMITED APPLICATION OF THE PROVISIONS OF ADMIRALTY RULE FIFTY-NINE.

Claimants urge that, inasmuch as they have concededly sought their proper remedy by proceeding in these causes conformably to Admiralty Rule Fifty-nine, that justice requires that claimants be not deprived of their remedy. They have relied upon the assurance of the Rule that they would not be ~~left~~^{left} without a remedy. The State of New York now seeks by this proceeding to frustrate the hope and belie the promise. It is urged that such cannot be permitted because not only was Rule Fifty-nine promulgated by this court itself for the more satisfactory and equitable disposition of actions requiring its application, but also because its application in kindred cases has hitherto been looked upon with favor by this court. We venture to assert that a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction may not be deprived of the right to have such suit adjudicated by a court upon which admiralty jurisdiction has been conferred by the Constitution. Indeed, the object of Rule Fifty-nine has been said to be remedial and it should be liberally applied to cases which fall within its general scope and purpose. *Joice v. Canal Boats*, 32 Fed., 553, 554. The reasoning which led the District Judge in "*The Alert*", 40 Fed., 469, to the conclusion expressed therein has the most complete and precise application in these causes. The damages sued for here are damages accruing while

the vessels were in the possession and under the dominion of the charterer, he was the owner *pro hac vice*, the owners, who have been compelled to interpose as claimants to prevent the sacrifice of their property under admiralty process, are under no personal responsibility for they are strangers to the matters complained of, and without any certain means of ascertaining the facts. If the ship be liable therefor, the charterer is also liable. Nevertheless, if claimants be defeated in admiralty, they are, by express provision of law, barred from any recourse or recoupment as against the charterer by way of indemnity for the losses they have suffered. It would be equally as reasonable and just to arbitrarily relegate libellants to any remedy which they might have directly against the charterer and prohibit their further claim in admiralty as against these claimants as it would be to prohibit claimants in the exercise and maintenance of their rights under the Rule. Moreover, the owners of the vessels had a complete legal right to require that the charterer should return said vessels to them at the expiration of the charter free from liens caused by his fault or neglect. *The Barnstable*, 181 U. S., 464. Any other rule would only result in a cessation of the practice of chartering vessels and a consequent death blow to American shipping, a result which is not in keeping with the policy of Congress to protect and encourage shipping, as expressed in the acts limiting liability of vessels.

It may be further observed that the State of New York is here seeking to prohibit that which the United

States has recently by Act of Congress expressly granted. We refer to the Act of March 9th, 1920, being Section 125 $\frac{1}{4}$ U. S. Compiled Statutes, Chapter Eleven A, being an enactment authorizing suits against the United States in Admiralty and therein providing for service of process upon, and entry and filing of decrees against, the United States in such action. Suffice it to observe that the Federal Government having embarked in the business of operating vessels for profit, has provided a method for reimbursement for damage created by such operation. It is contended therefore that, with the door to other relief concededly closed in the faces of these claimants by the Legislature and Courts of the State of New York, if there ever were causes wherein justice required the application of the provisions of Admiralty Rule Fifty-nine, that the present actions constitute such causes.

2. THE CHARACTERISTIC UNIFORMITY OF MARITIME LAW AND ITS RULES HAS HERETOFORE BEEN STRONGLY UPHOLD BY THIS COURT.

We believe it to be a fair statement that nowhere has this court exhibited greater concern anent any principle submitted to it for consideration and decision than has been indicated by its repeated expressions of its determination to maintain the characteristic countrywide uniformity of maritime law and its rules. Mr. Justice McReynolds in *Knickerbocker Ice Company v. Stewart*, decided May 17, 1920, not officially reported, in the discussion of the question of admir-

alty and maritime jurisdiction as affected by an award of the New York Industrial Commission, laid down the following doctrine:

“As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal Courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago”.

And it was further clearly pointed out therein, after quoting from the decision on which such doctrine is based, i. e. *The Lottawanna*, *supra*, that the Constitution adopted the rules concerning such rights and liabilities and these were not less paramount than had they been enacted by Congress. *Otherwise it is impossible to account* for a multitude of adjudications by the Admiralty Court such as the *Workman* case, cited and quoted from at length above.

See also Union Fish Co. v. Erickson, 248 U. S., 308;

Southern Pacific Co. v. Jensen, 244 U. S., 205.

It being established therefore that the characteristic uniformity of the body and rules of maritime law will be upheld by this court and not permitted to be devitalized by the subjecting of the same to the enactments, regulations or desires of the several States, it follows that the application for writs of prohibition and/or mandamus must be denied. For as was said by District Judge Learned Hand, in "*The Florence H*", 248 Fed., 1012, in discussing the *Workman* case *supra*, that while it was true that that case involved not a sovereign, but a municipal corporation, and there might, a priori, be ground for distinction between such a party and a sovereign, no such distinction was in fact made, but rather that the decision applied the rule of respondeat superior without exception and in citing "*The Siren*", *supra*, and "*The Athol*", 1 Wm. Rob., 374 as confirming the general ap-

plicability of the rule, there was removed any doubt that there then existed any distinction in the mind of the court between corporations, sovereign and municipal.

It being established that the District Court has exclusive original jurisdiction; that all the necessary elements thereof are here present; that there exists liability on the part of the charterer for the collision damages which may not be avoided; that this court has ever upheld the dignity and power of the admiralty to the exclusion of all local regulations or enactments; that no distinction has heretofore been made in the applicability of the Fifty-ninth Rule, it therefore follows that claimants are entitled to the remedy which they have sought and to their day in court in order to maintain the same. Any other conclusion would be in active discord with the equitable principles of the admiralty jurisdiction.

CONCLUSION.

Respondent therefore respectfully submits that upon general principles of law, the rules to show cause should be dismissed and the writs of prohibition and/or mandamus denied.

Respectfully submitted this 3^d day of December, 1920

STANLEY & GIDLEY,

Proctors for Hon. John R. Hazel,

United States District Judge,

Western District of New York

ELLIS H. GIDLEY,

Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

In the Matter of the Petition of THE
STATE OF NEW YORK and THE PEOPLE
OF THE STATE OF NEW YORK, as owner
of the Steam Tug "QUEEN CITY."

No. ———, 2
Original.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes CHARLES D. NEWTON, Attorney-³
General of New York, on behalf of the State of New
York and the People of the State of New York,
owners of the Steam Tug "QUEEN CITY," and
respectfully moves this Honorable Court:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed.

2. That a rule to be entered and issued directing⁴
the District Court of the United States for the
Western District of New York and Honorable John
R. Hazel, the Judge thereof, and the officers of said
Court, to show cause why a writ of prohibition and
/or a writ of mandamus should not issue against them
and each of them, in accordance with the prayer of
said petition, and why the State of New York and
The People of the State of New York should not have⁵
such other and further relief therein, as may be just.

CHARLES D. NEWTON,
Attorney-General of New York.

October 25, 1920.

George A. King
[3]

6

NO. ———, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1920.

7

In the Matter of the Petition of the
 STATE OF NEW YORK and THE PEOPLE
 OF THE STATE OF NEW YORK, owners
 of the Steam Tug "QUEEN CITY,"
 for a Writ of Prohibition and/or a
 Writ of Mandamus against the
 Honorable JOHN R. HAZEL, Judge
 of the District Court of the United
 States for the Western District of
 New York, and the Officers of the
 said Court.

8

**PETITION FOR A WRIT OF PROHIBITION AND/OR A
 WRIT OF MANDAMUS.**

9

*To the Honorable the Chief Justice and the Associate
 Justices of the Supreme Court of the United
 States :*

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The petition of CHARLES D. NEWTON, Attorney-
 General of New York, on behalf of the State of New
 York and the People of the State of New York,
 owners of the steam tug "QUEEN CITY," against the
 Hon. JOHN R. HAZEL, the Judge of the District Court
 of the United States For the Western District of New
 York, sitting in admiralty, and the officers of said
 court, respectfully represents:

First. That the Steam Tug "QUEEN CITY" now is,
 and at all the times hereinafter mentioned was, the
 property of the State of New York, in its possession

and control and employed in the public governmental service of the State of New York. 11

Second. That on October 11, 1920, Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn McGahan filed a libel in the District Court of the United States For the Western District of New York, in admiralty against the said steam tug "QUEEN CITY," to recover from the said tug damages in the sum of (\$50,000), alleged to have been sustained through the loss of the life of the intestate, Evelyn McGahan, by drowning, and prayed that process issue against said steam tug "QUEEN CITY," her tackle, apparel and furniture, according to the course and practice in admiralty, as will more clearly appear from the certified copy of said libel which is attached hereto, made a part hereof and marked "Paper " " A." 12 13

Third. That thereafter your petitioner appearing specially, and not otherwise, for the purpose of questioning the jurisdiction of the court in the United States District For the Western District of New York, filed a suggestion of want of jurisdiction over the steam tug "QUEEN CITY" upon the ground that said steam tug "QUEEN CITY" is the property of the State of New York and The People of the State of New York and used by them solely for public governmental purposes, as will more clearly appear by the certified copy of said suggestion of want of jurisdiction, which is attached hereto, made a part hereof and marked "Paper " " B." 14 15

Fourth. That thereafter, Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York, overruled and denied the suggestion of want of jurisdiction by an order duly

- 16 filed, as will more clearly appear from a certified copy of said order, attached hereto, made a part hereof and marked "Paper" "C."

- That attached hereto and made a part hereof and marked respectively Papers "D", "E", and "F" and are certified copies of the list of docket entries, order for process and warrant of arrest in the foregoing cause in the District Court in Admiralty. That the papers referred to herein and marked from "A" to "G" constitute the whole of the record proper in the District Court in Admiralty and no more.

Wherefore the said CHARLES D. NEWTON, Attorney General of New York, the aid of this honorable court, respectfully requesting prays:

- 18 1. That a writ of prohibition may issue out of this honorable court to the said Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York and/or the officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said
- 19 causes, or the enforcing of any order, judgment or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorably court, directing and commanding the Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York, to vacate the order so entered by him, overruling and denying the suggestion of want of jurisdiction and further to enter order in said cause declaring the said steam tug "QUEEN CITY" immune from attachment, arrest or seizure of any kind whatsoever.
- 20

3. That the court grant to the State of New York ²¹
and the people of the State of New York such other
and further relief as may be just in the premises.

George A. King

CHARLES D. NEWTON,
Attorney General of New York
and Attorney for THE STATE
OF NEW YORK and THE PEOPLE ²²
OF THE STATE OF NEW YORK,
Owners of the Steam Tug
"Queen City."

I have read the foregoing petition by me subscribed,
and the facts therein stated are true to the best of my
information and belief.

CHARLES D. NEWTON, ²³

Subscribed and sworn to before me
this 25th day of October, 1920.

[SEAL] W. M. THOMAS,
Notary Public.

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26

PAPER A.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

27 MARTIN J. MCGAHAN and MARGARET
MCGAHAN, as Administrators of the
Goods, Chattels and Credits of
EVELYN MCGAHAN, Deceased.

*Libelants,**against*

QUEEN CITY,

28

Defendant.

TO THE HON. JOHN R. HAZEL, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK:

29 The libel and complaint of Martin J. McGahan and
Margaret McGahan as administrators of the Goods,
Chattels, and Credits of Evelyn McGahan, deceased,
against the steam vessel Queen City, her tackle, ap-
parel and furniture, in the cause for damages for
personal injuries, civil and maritime, alleges as
follows:

30 First: That libelants are residents of the City of
Buffalo, and State of New York, and within the West-
ern District of the State of New York; that said steam
vessel Queen City, at the times hereinafter mentioned,
was engaged in sailing upon maritime waters, includ-
ing the Erie Canal, in the State of New York, plying
between various points upon said canal particularly
in the vicinity of Buffalo, New York.

Paper A

Second: That on the 26th day of July, 1919, while
 said Queen City was being so used and operated on
 said maritime waters, being the Erie Canal, in the
 vicinity of Buffalo, New York, libelants' intestate,
 Evelyn McGahan, was permitted, invited and induced
 by said vessel to ride as a person, guest or passenger
 thereon; that by reason of the negligence and carelessness
 of said Queen City and those owning and operating
 the same, being the negligence and carelessness of
 said vessel while being so sailed and operated in said
 maritime waters in the Western District of New York;
 that said vessel was not properly equipped according
 to the maritime rules and requirements for the purpose
 of carrying passengers, guests or persons, or
 for the purpose of carrying said intestate, had not the
 necessary complement of crew required by the United
 States laws and rules applicable and in force at the
 time; had not been inspected or properly licensed or
 certified by duly authorized inspectors for the purpose
 of carrying passengers, guests, or persons, including
 intestate; was not equipped with necessary life preservers,
 guards and equipment, necessary safety devices for the
 protection and accommodation of said passengers, guests
 or persons, did not have the necessary and required life
 preservers, and did not have the same properly placed
 and ready for use; did not have the necessary and
 required seating capacity; was overcrowded, was not
 sufficiently lighted; did not have proper and necessary
 number of suitable chairs and benches to sit upon; was
 being operated and sailed in violation of the laws of
 the United States and the requirements pertaining to
 navigation applicable and in force; had upon it a greater
 number of passengers,

36

Paper A

guests, or persons that could be safely carried or accommodated thereon, all of which was by reason of the negligence and carelessness of said vessel Queen City; that said vessel was not supplied with sufficient or proper life preservers, and life saving apparatus, appliances and equipment; did not have proper and suitable railings or guards upon or about its decks, constructed and placed for the purpose of protecting those riding on her by reason of the negligence of said vessel Queen City, and by reason of which said Queen City was dangerous and unsafe to ride upon and dangerous and unsafe to libelants' intestate who was permitted, invited and induced to ride thereupon, by reason of which said intestate lost her life by drowning.

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Third: Libelants further allege that said vessel, Queen City, and its master and those in control and management of the same negligently and knowingly permitted said vessel to be so used for the purpose of carrying persons, passengers or guests, including intestate, unlawfully, and without license or authority, and without such proper and adequate equipment, and when the same was, by reason of the facts hereinbefore alleged, unsafe and dangerous to ride upon by reason of which negligence intestate lost her life by drowning.

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Fourth: That said decedent was a woman of the age of twenty-two years, a resident of the State of New York, in good health, and was in the employ of the United States Government as a stenographer, typist, or clerk at Fort Porter, Buffalo, New York; that her earnings, as libelants are informed and believe, were \$83.33 a month; that said decedent was

Paper A

unmarried and was living with these libelants and administrators, who were, and are, her father and mother; that said decedent was contributing to the support and maintenance of her said father and mother and her earnings were applied and used for that purpose in large part.

Fifth: That heretofore and on the 29th day of November, 1919, the libelants were duly appointed administrator and administratrix of the Goods, Chattels, and Credits of the estate of said deceased and as such are the owners of the cause of action for which this libel is made, and have a right to prosecute the same by Letters of Administration duly issued by the Surrogate's Court of Erie County, New York, on the date above mentioned, after due proceedings had in said court, and said libelants are now acting as such administrators; that said Letters of Administration are limited letters and authorize and empower these libelants to present and prosecute this libel and to collect and distribute any damages recovered under the order of said court, as such administrators.

Sixth: That by sections 1902, 1903, 1904, 1905, of the Code of Civil Procedure of the State of New York, libelants are authorized and empowered to prosecute and recover herein for the recovery of damages for the death of said decedent against said vessel, Queen City.

Seventh: That by reason of said negligence of said vessel Queen City, and the death of said intestate resulting therefrom libelants have been, and were, damaged in the sum of Fifty Thousand Dollars (\$50,000.00).

Eighth: That all and singular the premises are true

Paper A

46

and within admiralty and maritime jurisdiction, and this honorable court, in verification whereof, if denied, the libelants herein crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

47

WHEREFORE, The libelants pray that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against said vessel Queen City, her tackle, apparel, and furniture, and that all persons have or pretending to have any right, title or interest therein, may be cited to appear and to answer all and singular the matters and things hereinbefore set forth

48

and for a jury trial of the issues herein, and that this honorable Court would be pleased to decree the payment to these libelants of the sum of Fifty Thousand Dollars (\$50,000.00) for their damages aforesaid, with costs, and that the libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

49

HALEY & UECK,
Attorneys for Libelants,
Office and P. O. Address,
425 Ellicott Square,
Buffalo, N. Y.

50

STATE OF NEW YORK,
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK, } ss.:

MARTIN J. MCGAHAN, being duly sworn, deposes and says that he is one of the libelants in this action, that he has read the foregoing libel and knows the contents

Paper A

thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

MARTIN J. McGAHAN.

Subscribed and sworn to before me
this 9th day of October, 1920.

JOSEPH M. CARRIERO,
Notary Public, Erie County, N. Y.

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Label with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal
of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, this 27th day of
October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

PAPER B

District Court of the United States

57

Western District of New York

58

MARTIN J. MCGAHAN and MARGARET
MCGAHAN as Administrators of the
Goods, Chattels, and Credits of
Evelyn McGahan, Deceased,

Libelants,

against

QUEEN CITY,

Defendant.

Suggestion
of want of
jurisdiction

59

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NOW COMES CHARLES D. NEWTON, Attorney General
of New York, by his Deputy, Edward G. Griffin,
appearing specially, and not otherwise, for the purpose
of questioning the jurisdiction of the Court, as Proctor
for the State of New York, the People of the State
of New York and the steam vessel "QUEEN CITY"
and respectfully suggests that this Honorable Court
is without jurisdiction to proceed herein for the
reason that the "QUEEN CITY" now is, and was at all
the times mentioned in the libel herein the absolute
property of the State of New York in its possession
and control and is now employed in the public service
of the State for public State and Governmental uses

Paper B

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and purposes, and was authorized by law at all the times mentioned in the libel herein to be employed only for the public State and Governmental uses and purposes of the State of New York and none others. That such Governmental uses and purposes are generally the repair and maintenance of the Improved Erie Canal, a public work owned and operated by the State of New York, and particularly the towing of dredges, carrying of materials and workmen and the towing of barges and vessels containing materials, the setting, replacing and removing of buoys, signals and safety devices in all works of repair, operation and maintenance of said canal.

62

That substantially the same cause of action was set forth in the claim of Martin J. McGahan and Margaret McGahan, Administrators of the Goods, Chattels and Credits of Evelyn McGahan, deceased against The State of New York in the Court of Claims of the State of New York. That said Court of Claims dismissed said claim for want of jurisdiction as will more fully appear by duly certified copies of said, Claim, Affidavit and Judgment Dismissing Claim, attached hereto, made a part hereof and marked respectively "papers" "1," "2" and "3." That further the State has disclaimed all liability for the cause of action alleged in said claim and the libel herein under the proviso contained in Section 47 of the Canal Law of the State of New York (Consolidated Laws, Ch. 5, L. 1919, Ch. 13) providing as follows: "provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals." That an appeal is now pending by the claimants therein, being the same as the libelants herein, in the Supreme Court of the State of New

63

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65

Paper B

66

York, Appellate Division, 4th Department from the aforesaid judgment of the Court of Claims and remains at this time undecided.

67

Wherefore the said CHARLES D. NEWTON, Attorney-General of New York without submitting the rights of the State of New York or the People of the State of New York or the steam vessel "QUEEN CITY" to the jurisdiction of the Court, but appearing specially, and not otherwise, suggests that the cognizance of this cause belongeth not to the Court and prays that said steam vessel "QUEEN CITY" be declared immune from process and free from seizure and attachment, and that the libel filed in the above cause and all proceedings had thereunder be dismissed for want of jurisdiction, and that such order may be entered in the premises as may be proper.

68

Dated October 21, 1920, Albany, N. Y.

CHARLES D. NEWTON,
Attorney-General of New York.

69

By EDWARD G. GRIFFIN,
Deputy Attorney-General,

Appearing specially and not otherwise, as Proctor for the State of New York, the People of the State of New York and the steam vessel 'Queen City.'

70

Office and P. O. Address,
The Capitol, Albany, N. Y.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

I have read the foregoing suggestion of want of jurisdiction, by me subscribed and the facts therein

Paper 1

stated are true to the best of my information and belief.

71

EDWARD G. GRIFFIN,

Subscribed and sworn to before me
this 23rd day of October, 1920.

F. J. SCHILLING,

Notary Public, Rens. Co., N. Y.

Certified filed in Albany Co.

72

PAPER 1

STATE OF NEW YORK.—COURT OF CLAIMS.

MARTIN J. MCGAHAN and MARGARET
MCGAHAN, Administrators of the
Goods, Chattels and Credits of
Evelyn McGahan,

73

Deceased,

As Amended

against

THE STATE OF NEW YORK.

74

1. The postoffice address of the claimants herein is 280 Vermont Street, City of Buffalo, State of New York.

2. This claim is for negligence of the State of New York in knowingly and with the privity and knowledge of the State of New York, in sailing and operating a certain vessel or tug boat known as and called the Queen City belonging to the State of New York, by the officers, agents and servants of the State of New York, in, on or through United States Waters on the Erie Canal between the Cities of Tonawanda, N. Y.,

75

76

Paper 1

and Buffalo, N. Y., at some point between West Ferry Street in the City of Buffalo, N. Y., and the City of Tonawanda, N. Y., carrying passengers, guests and persons, including plaintiffs' intestate Evelyn McGahan, deceased, in violation of the laws of the United States and the State of New York, and the laws, rules

77

and regulations of the United States pertaining to navigation of such vessels, including the said vessel Queen City, without license or authority to carry persons, guests and passengers, including plaintiffs' intestate, without proper equipment for that purpose or for sailing in United States waters and in the waters of the Erie Canal, and where said boat was at

78

the time of the accident; without the proper and necessary inspection for said purpose required by the laws of the United States and the regulations pertaining to navigation in United States and Erie Canal waters, without the proper means and equipment for preventing or saving passengers, guests and persons riding upon said boat from drowning, such as is required by

79

law, particularly suitable and proper railings about the decks, gunwales and bulwarks and passageways of said vessel, and suitable and proper life-saving apparatus; without the necessary and proper seating capacity and accommodations for such persons, guests and passengers being so carried without the necessary safeguards and protection of said persons, guests and passengers to prevent them from falling off or being

80

thrown or dragged from said vessel or tug boat, and while said vessel or tug boat for said above reasons was in a dangerous and unsafe condition in or upon which to carry passengers, guests or persons, all of which was by reason of the negligence and carelessness and privity and knowledge of the State of New

York, its officers and servants, by which plaintiffs' intestate Evelyn McGahan, deceased, being a passenger, guest or person upon said vessel at the time, fell or was thrown or dragged from said vessel into the waters of said canal on the 26th day of July, 1919, by reason of which she lost her life.

The nature of said claim and the circumstances surrounding the occurrence thereof pertaining to the negligence of the State are more fully hereinafter set forth.

That said accident and death occurred without any negligence on the part of said decedent.

3. This claim has not been assigned, and has not been submitted to any other tribunal or officer for audit or determination.

4. Attached hereto is a copy of the notice of intention to file this claim, which notice was filed in the office of the Clerk of the Court of Claims on the twenty-second day of January, 1920, and in the office of the Attorney-General on the twenty-second day of January, 1920, and in the office of the Superintendent of Public Works on the twenty-second day of January, 1920.

5. This claim is filed within two years after the claim accrued, as required by law.

6. Attached hereto as a part of the claim is a rough sketch of the place of the accident.

7. The nature of said claim and particulars of claimants' damages are as follows:

That heretofore and on or about the 26th day of July, 1919, the State of New York was the owner of and by its officers, agents and servants was operating or sailing a certain vessel or tug boat known as and called the Queen City, which was sailing and was

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- being operated by the State of New York, its officers, agents and servants on the Erie Canal between the cities of Tonawanda, N. Y., and Buffalo, N. Y., the precise point between said cities being West Ferry street in said City of Buffalo, N. Y., and southerly boundary of the City of Tonawanda, N. Y.; that said
- 87 boat was being used by or was being sailed or operated by the State of New York, its officers, agents and servants, with the privity and knowledge of the State of New York, and was engaged in carrying persons, guests and passengers, being a picnic party of about thirty or more people, all of which were members or guests or friends of the Holy Angels Choir or singing
- 88 society of the Holy Angels Church of Buffalo, N. Y.; that above named Evelyn McGahan was one of said persons, guests and a passenger on said vessel, and was being so carried and transported as such person, guest or passenger by the State of New York, its officers, agents and servants in and through the said Erie Canal at the point or place above designated; that
- 89 said passengers, guests, and persons, including the said deceased, had been carried and transported from the City of Buffalo, N. Y., to Tonawanda, N. Y., in the vicinity of Pendleton, N. Y., and the said vessel was at the time of the accident, hereinafter described, engaged in carrying and transporting said passengers, guests, or persons, including the said Evelyn McGahan,
- 90 from said vicinity of Pendleton back to Buffalo in and through the Erie Canal, which is used by the State of New York; that during the course of said voyage said vessel entered and passed through Federal or United States water; that said vessel was at the time of said voyage, and at the time of said accident, heretofore and hereinafter described, not properly equipped for

carrying said passengers, guests, or persons; had not the necessary complement of crew required by the United States laws and rules applicable and in force at the time; had not been inspected or properly licensed or certified by duly authorized inspectors for the purpose of carrying said passengers, guests, or persons on said voyage, and was not equipped with necessary life preservers, guards and equipment for the protection and accommodation of said passengers, guests, or persons, and was not sufficiently lighted for that purpose, and was not equipped with a proper number of suitable chairs or benches to sit on for the accommodation of said passengers, guests, or persons, including deceased, and was being operated and used for the purpose of carrying said persons, guests, or passengers, including the deceased, in violation of the United States laws and of the regulations pertaining to navigation applicable and in force; that said vessel was over-crowded by reason of having taken on a greater number of passengers, guests, or persons than could be safely carried or accommodated on board said vessel; that the State of New York and the officers and agents thereof having the duty to operate, care for and control said vessel were negligent and careless in all the respects above mentioned wherein said boat was deficient and not properly licensed, certified, manned, or equipped and fitted out for the purpose of carrying persons, guests or passengers, including deceased, on the voyage or trip above mentioned, and in the use of said boat for the purpose of carrying persons, guests, and passengers, including said deceased, and in violation of United States laws and regulations pertaining to navigation, and the said vessel was at the

time of said accident being negligently and carelessly operated and handled and in violation of the United States Laws by the State of New York, its agents, officers and employees; and with the privity and knowledge of the State of New York; that said vessel was not supplied with sufficient or proper life saving apparatus, appliances and equipment, particularly in the fact that proper and suitable railings or guards were not constructed, placed or erected about the deck or gunwales or bulwarks of said vessel Queen City sufficient to properly protect passengers, guests, or persons riding on said vessel, the absence of which safeguards, appliances and equipment rendered said vessel dangerous, and the situation of persons, guests, or passengers, including decedent, riding upon said vessel at the time, dangerous to life; that by reason of the lack of equipment, safeguards and appliances, and the proper measures, devices and equipment for the protection of said passengers, guests, or persons, some of said passengers, guests or persons, including deceased, were compelled to sit on the side or gunwale, or bulwark of said boat, and were permitted so to sit by the State of New York, its officers, servants, agents and employees while traveling as persons, guests, or passengers upon said vessel; that by reason of the premises above stated, the decedent, a person, guest and passenger on said boat and in the care and protection thereof was thrown from said vessel or caused to fall or dragged therefrom, into the waters of the Erie Canal, and thereby came to her death.

That said vessel Queen City was owned by the State of New York, and used exclusively in connection with the canals owned and cared for and operated by the State of New York, and in such care and

in the upkeep and repair of said canals, and the management thereof, by officers of the State including the superintendent of said canals, Charles J. McDonough, and the captain or master of said boat, Charles J. Day, in charge thereof and of said canals and the crew, and employees engaged upon and in connection with said vessel, and the said vessel, while in charge of said officers and employees was being used by them upon the canals thereof, so in the charge of said officers, at the time of said accident. 101 102

This claim is filed, and claimant claims herein, under Section 47 of the Canal Law of the State of New York, also under Section 264 of the Code of Civil Procedure.

That the said decedent was a woman of the age of twenty-two years, a resident of the City of Buffalo, State of New York, in good health, and was in the employ of the United States Government as a stenographer, typist or clerk at Fort Porter, Buffalo, N. Y., that her earnings, as claimants are informed and believe, were eighty-three dollars and thirty-three cents (\$83.33) a month; that said decedent was unmarried and was living with these claimants and administrators who were and are her father and mother; that the said decedent was contributing to the support and maintenance of her said father and mother, and her earnings were applied and used for that purpose in large part. 103 104

That heretofore and on the 29th day of November, 1919, the claimants were appointed administrators of the goods, chattels and credits and of the estate of the said deceased and of the claims herein referred to, and as such are the owners of said claim and have a right to prosecute the same by Letters of Administration 105

Paper 1

106

duly issued by the Surrogate's Court of Erie County on the date above mentioned after due proceedings had in said court, and said claimants are now acting as said administrators; that said Letters of Administration are Limited Letters, and authorize and empower these claimants to present and prosecute the claim

107

herein referred to, and to collect and distribute the same under the order of said court as such administrators.

108

That two years have not elapsed since this claim accrued or since the happening of said accident and the death of said decedent, Evelyn McGahan; that the amount of said claim hereby presented and filed is fifty thousand dollars (\$50,000.00); to wit: undertaker's bill three hundred dollars (\$300.00); lot in cemetery, sixty-six dollars (\$66.00), and balance amounting to forty-nine thousand six hundred thirty-four dollars (\$49,634.00), loss sustained by estate of next of kin of Evelyn McGahan, deceased, by reason of her death.

109

HALEY & UECK,

Attorneys for Claimants,

Office and P. O. Address,

425 Ellicott Square,

Buffalo, N. Y.

STATE OF NEW YORK,

110 CLERK'S OFFICE, COURT OF CLAIMS, } ss.:
CAPITOL, CITY OF ALBANY.

I, WILLIAM E. CONNORS, Deputy Clerk of the Court of Claims of the State of New York, do hereby certify, That I have compared the foregoing and annexed copy of the amended claim of Martin J. McGahan and Mar-

Paper 2

111

garet McGahan, Administrators of the goods, chattels and credits of Evelyn McGahan, deceased, Claim No. 16548, filed February 27, 1920, against the State of New York with the original thereof on file and of record in this office, and that the same is a correct transcript therefrom.

IN TESTIMONY WHEREOF, I have hereunto set
[SEAL] my hand and affixed the seal of said Court
of Claims at the Capitol, in the City of
Albany, N. Y., this 23d day of October,
A. D. 1920.

WM. E. CONNORS,
Deputy Clerk of the Court of Claims.

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PAPER 2

STATE OF NEW YORK — COURT OF CLAIMS.

MARTIN J. MCGAHAN and MARGARET M.
MCGAHAN, Administrators of the
Goods, Chattels and Credits of
EVELYN MCGAHAN, Deceased,
Claimants,
against
THE STATE OF NEW YORK.

Claim
No. 16548.

114

STATE OF NEW YORK, }
COUNTY OF ALBANY, } ss.:
CITY OF ALBANY. }

115

CAREY D. DAVIE, being duly sworn, deposes and says
that he is a Deputy Attorney General of the State of
New York and as such has the general charge for and
on behalf of the Attorney General's office of matters

116

Paper 2

pending in the Court of Claims against the State of New York.

That the above entitled claim, as appears from the records of said court, was filed in the office of the Clerk of the Court of Claims on the 27th day of February, 1920, and that the filing of said claim was preceded by the filing of a notice of intention herein, such notice having been verified on the 21st day of January, 1920.

Deponent further says, as will more fully appear from an inspection of said claim, that said claim was filed for the purpose of recovering against the State the sum of \$50,000 damages occasioned from the death of claimants' intestate, Evelyn McGahan, as is alleged, through and in consequence of the negligence of the State of New York, its officials, servants and employees, and that deponent hereby specifically refers to said claim and all of its allegations for the purpose of showing that said claim is based upon the alleged negligence of said State officials.

Deponent further says that it is the contention of the Attorney General's office that said claim fails to state facts sufficient to constitute a cause of action against the State and that the acts herein alleged and upon which said claim is predicated are acts from which the State is immune from all damages and from liability.

Deponent further says that no former application has ever been made for an order dismissing or discontinuing said claim.

CAREY D. DAVIE.

Subscribed and sworn to before me
this 9th day of April, 1920.

LILLIAN C. CHASE,
Notary Public.

PAPER 3

121

STATE OF NEW YORK.—COURT OF CLAIMS.

MARTIN J. MCGAHAN and Another as
Administrators, etc.,

Claimants,

against

STATE OF NEW YORK.

Claim
No. 16548.

122

An order having been heretofore duly granted requiring the above named claimants to show cause at a regular session of the Court of Claims held at the City of Buffalo on May 10, 1920, why the above entitled claim should not be dismissed and the State of New York having duly appeared upon the return of said order, to wit: May 10, 1920, at the City of Buffalo, N. Y., by Carey D. Davie, Deputy Attorney-General, and the above named claimants having also then and there duly appeared by their attorneys, Messrs. Haley & Ueck, and having heard the arguments in support of and in opposition to said motion and after due deliberation thereon,

124

It is now hereby ordered that the above named claim be and the same is hereby in all things dismissed and discontinued for the reason and upon the ground:

First. That said claim does not state facts sufficient to constitute a cause of action against the State of New York.

125

Second. That the facts alleged and set forth in said claim do not allege or state a liability upon or cause of action against the State.

Dated at Albany, N. Y., this 29th day of June, 1920.

FRED M. ACKERSON,

WILLIAM W. WEBB,

Judges of the Court of Claims.

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Paper 3

STATE OF NEW YORK,
CLERK'S OFFICE, COURT OF CLAIMS, } ss.;
CAPITOL, CITY OF ALBANY.

I, WILLIAM E. CONNORS, Deputy Clerk of the Court of Claims, of the State of New York, do hereby certify,
127 That I have compared the foregoing and annexed copy of the order in the claim of Martin J. McGahan and another as administrators, etc., Claim No. 16548, (dismissing the claim) against the State of New York with the original thereof on file and of record in this office, and that the same is a correct transcript therefrom.

128

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court
[L. S.] of Claims at the Capitol, in the City of Albany, N. Y., this 23rd day of October A. D. 1920.

WM. E. CONNORS,

Deputy Clerk of the Court of Claims.

129

At a Term of the United States District Court held in and for the Western District of New York in the Federal Building in the City of Buffalo, N. Y., on the , day of October, 1920.

Present:

130

HON. JOHN R. HAZEL,
District Judge Presiding.

UNITED STATES OF AMERICA, } ss:
 WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Suggestions of Want or Jurisdiction with the papers annexed thereto, with the Original entered and on file in your office, and that the same is a correct transcript therefrom, and of the whole of said Original. 132

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City 133
 [SEAL] of Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

At a Term of the United States District 134
 Court held in and for the Western District of New York in the Federal Building in the City of Buffalo, N. Y., on the 28th day of October, 1920.

Present:

HON. JOHN R. HAZEL,
District Judge Presiding.

136

PAPER C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

137

MARTIN J. MCGAHAN and MARGARET
MCGAHAN as Administrators of the
Goods, Chattels and Credits of
EVELYN MCGAHAN, Deceased.

*Libelants,**against*

QUEEN CITY,

Defendant.

Order
Overruling
Suggestion
Of Want of
Jurisdiction.

138

A libel having been filed herein by the above named libelants against the steam vessel "Queen City" on the 11th day of October, 1920, and Charles D. Newton, Attorney General of New York, having appeared specially, and not otherwise, for the purpose of questioning the jurisdiction of the court as Proctor for the State of New York, The People of the State of New York and the steam vessel "Queen City," and having filed a suggestion of want of jurisdiction herein on the 25th day of October, 1920, and a copy of said suggestion of want of jurisdiction having been served upon the libelants herein.

139

Now after reading the libel and the suggestion of want of jurisdiction herein and due deliberation having been had thereon, it is,

140

ORDERED that the suggestion of want of jurisdiction herein be and the same hereby is overruled and denied with costs.

Enter:

JOHN R. HAZEL,

D. J.

Paper D

141

UNITED STATES OF AMERICA, } ss.:
 WESTERN DISTRICT OF NEW YORK, }

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Order Overruling Suggestion of Want of Jurisdiction with the Original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said Original. 142

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City [SEAL] of Buffalo, in said District, this 27th day of October, A. D. 1920. 143

HARRIS S. WILLIAMS,
Clerk.

PAPER D

DOCKET.

144

MARTIN J. MCGAHAN and MARGARET
 MCGAHAN as Administrators of the
 Goods, Chattels and Credits of
 EVELYN MCGAHAN, Deceased,

against

Steam Vessel "QUEEN CITY," Her
 Tackle, Apparel and Furniture.

145

Haley & Ueck Solr's for Libellant.

Damages for personal injuries \$50,000 and costs.
 October 11, 1920, Deposit by Haley & Ueck,

Attys \$10 00

156

Paper F

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, the 8th day of November, A. D. 1920.

157

HARRIS S. WILLIAMS,
Clerk.

PAPER F

UNITED STATES OF AMERICA, } ss.:
WESTERN DISTRICT OF NEW YORK, }

*The President of the United States of America to the
158 Marshal of the Western District of New York,
and to His Deputy, Whomsoever,*

GREETING:

You are hereby jointly and severally empowered, and strictly enjoined, and commanded, that you arrest the Steam vessel called the "Queen City," her engines, boilers, machinery, boats, tackle, apparel and
159 furniture, if she shall be found within your district; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the said court, or the same shall be discharged in the due course of law; and that you cite at the premises all persons in general who have, or pretend to have any right, title or interest therein, to appear
160 before the Judge of the District Court of the United States of America, for the Western District of New York, at the city of Buffalo, N. Y., on the 2nd day of November, 1920, if it be a court day, or else on the court day next following, at ten o'clock in the forenoon, there to answer unto the Libel of Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn

Paper F

McGahan, Deceased, in a cause of damages for personal injuries, civil and maritime.

And further to do and receive in this behalf, as to justice shall appertain; and that you duly certify the Judge of the aforesaid court what you shall do in the premises, together with these presents.

WITNESS, The Honorable JOHN R. HAZEL, Judge of the aforesaid court, at the City of Buffalo, this 11th day of October in the year of our Lord one thousand nine hundred and twenty. 162

Action for \$50,000 and costs, \$250.

AY C. SICKMON,
Chief Deputy Clerk. 163

MESSRS. HALEY & UECK,
(Seal Here) *Proctors for Libelant.*

45 Ellicott Square, Buffalo, N. Y.

Received Oct. 11, 1920

U. S. Marshal, Buffalo.

MARSHAL'S RETURN ON BONDING VESSEL.

In Obedience to the within writ, I did on the 11th day of Oct. 1920, at Buffalo, in my district, arrest the within mentioned vessel Queen City, her tackle, &c.; and I duly cited all persons to appear, as within commanded. 164

Subsequently, and on the _____ day of _____, 191 , having received a bond, duly executed and approved, conditioned to abide the decree of the court in this cause, I did release the said vessel, and return the said bond herewith. 165

Dated the day of, 191 .

JOMN D. LYNN,
U. S. Marshal.

By FRANK H. RINE,
Deputy.

176

II

" A VESSEL OPERATED BY A STATE IN A GOVERNMENTAL CAPACITY IS EXEMPT FROM PROCESS IN ADMIRALTY UNDER RULES OF COMITY."

177

It is well established that government vessels of the United States, and, indeed, of foreign governments, are exempt from Admiralty process under rules of comity. The learned Judge below in his opinion in the "Koerber" and "Charlotte" causes says this exemption has never been applied to a State of the Union. Yet, this exemption was held at the time of the Confederation to apply equally to a ship of war belonging to a State (evidently South Carolina) *Moietz v. South Carolina*, 17 Fed. Cases No. 9,697. The

178

immunity was held to apply in favor of a tug and dredge used by the Port of Portland, in a suit against them by the United States, *The John McCracken*, 145 Fed. 705. The immunity likewise saved an ice-boat of the City of Baltimore, *The F. C. Latrobe*, 28 Fed. 377. In *Workman v. New York City*, 179 U. S. 552, it

179

appeared that a municipal fire-boat was exempt in rem, but the city was liable in personam. A State however, partakes more of the attributes of sovereignty, while a municipal corporation does not necessarily. Therefore, even the action over in personam cannot be maintained against a State, for the reasons given in our memorandum in the "Koerber" and "Charlotte" motions. For further cases illustrative

180

of these propositions we refer to 1 *Corpus Juris* under title "Admiralty" page 1263, sections 56-59.

Dated, Albany, N. Y., October 26, 1920.

Respectfully submitted,

CHARLES D. NEWTON,

Attorney-General of New York.

EDWARD G. GRIFFIN,

Deputy Attorney-General.

George A. Olney

No. 26, ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE
STATE OF NEW YORK FOR A WRIT OF PRO-
HIBITION OR MANDAMUS AGAINST THE
HON. JOHN R. HAZEL, JUDGE OF THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW
YORK, IN A PROCEEDING IN A CASE OF AD-
MIRALTY AND MARITIME JURISDICTION
PENDING IN SAID COURT, ENTITLED:

MARTIN J. MCGAHAN AND MARGARET Mc-
GAHAN, AS ADMINISTRATORS OF THE
GOODS, CHATTELS AND CREDITS OF EVELYN
MCGAHAN, DECEASED,

Libellants,

vs.

QUEEN CITY,

Defendant.

RETURN

I, John R. Hazel, Judge of the District Court of the United States within and for the Western District of New York, for and in behalf of myself and the officers of said court, in obedience to the order to show cause herein issued out of the Supreme Court of the United States on the 22d day of November, 1920, upon the petition therefor by Hon. Charles D. Newton, Attorney-General of the State of New York, direct-

ing me and said officers of said court to show cause why a writ of prohibition, a writ of mandamus, or both, should not issue against me and said officers in accordance with the prayer of said petition, hereby appear, certify and make return herein as follows:

1. Answering paragraph "First" of said petition, attention is called to the fact that the records and proceedings in the suit in admiralty above entitled and referred to in the paragraph marked "Second" in said petition, do not disclose the identity of the owner of the vessel or who had possession and control of and was employing it at the time of the commission of the marine tort alleged in the libel in said suit, or that said vessel was being employed in governmental service of the State of New York.

No person, corporation, or state has appeared in said suit or made claim of ownership of said vessel or excepted or answered to said libel.

Therefore, the allegations contained in said first paragraph are not admitted.

2. Answering paragraph "Second" of said petition, it is true that on October 11, 1920, Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn McGahan, Deceased, filed a libel in the District Court of the United States for the Western District of New York, in admiralty, against the steam tug Queen City to recover damages in the sum of Fifty Thousand (\$50,000.00) dollars, alleged to have been sustained through the loss of the life of said deceased by drowning and the "Paper" referred to as "A" in said petition is a true copy of said libel.

3. Answering paragraph "Third" of said petition it is true that petitioner afterwards appeared specially, and not otherwise, for the purpose of questioning the jurisdiction of said court in said suit and filed suggestions of want of such jurisdiction over said steam tug Queen City upon the ground that said tug is the property of the State of New York and the People of the State of New York and used by them solely for public and governmental purposes, and the "Paper" marked "B" is a true copy thereof.

4. Answering paragraph "Fourth" of said petition it is true that I overruled said suggestions by an order duly entered and filed, and the "Paper" referred to in said paragraph as marked "C" is a true copy thereof. And also the "Papers" therein referred to as marked "D," "E," "F" are true copies of the list of docket entries, order for process, and warrant of arrest in said suit. And also it is true that the "Papers" referred to in said paragraph as marked from "A" to "G" constitute the whole of the record proper in the District Court and no more.

5. Further answering said petition, I beg to state that the jurisdiction of said District Court within the territorial limits of said district is, in admiralty, original and exclusive. The libel sets forth all facts necessary to support such jurisdiction and contains nothing upon which any claim of lack of jurisdiction can be based. The alleged facts as to the ownership of said vessel by the State of New York and the use thereof for governmental purposes subsequently and extraneously brought forth by petitioner, do not appear in the libel.

Whether it be a question of jurisdiction originally, or of subsequent ouster of jurisdiction originally properly obtained, or a mere question as to the exercise of the powers of the court of admiralty having jurisdiction, such question or questions ought to, and can only be litigated and passed upon in the case on the merits in the regular proceedings and practice in this court and in all admiralty courts, that is, an appearance by the State, claim of ownership of the vessel, plea of its sovereignty as a defense. If such plea be overruled then the State has another remedy, viz.: appeal to the Circuit Court of Appeals, and review of the decision of that court by the Supreme Court of the United States. As such proceedings and remedy are available to the State, prohibition does not lie.

Furthermore, if the usual and regular course and remedy be taken by the State by appearance in the suit, exception or answer, questions as to whether the State is liable in personam which may arise and be made available to libellants by an amendment of the libel; questions as to whether the State has not waived its immunity for such liability by virtue of Section

47 of the Canal Law of the State of New York, and Section 264 of the Code of Civil Procedure of said State; questions as to whether or not the use of the vessel in question by the State, through and by employees or officers, in the maintenance and operation of the canals of the State for commercial purposes, was using said vessel in such a governmental function as will oust the jurisdiction of the admiralty court over it; questions as to whether the State can defeat the exclusive and paramount jurisdiction and power of a federal court otherwise having jurisdiction in admiralty by a plea based on its sovereign attributes as such owner and operator; may be properly litigated and determined, and reviewed by the higher courts, on the merits. They cannot be so properly litigated and determined in an application for a writ of prohibition or mandamus.

Finally, it is submitted that, as the federal judicial power extends to all cases of admiralty and maritime jurisdiction and is exclusive, it cannot be defeated or interfered with by any law of a state, whether statutory or common, or whether arising from or based upon any attribute of the sovereignty of said State.

Having fully answered in behalf of myself and the officers of said court, I respectfully submit that said rule should be dismissed and said writ denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, JOHN R. HAZEL, Judge of the District Court of the United States for the Western District of New York, for and in behalf of myself and the officers of said court have hereunto set my hand and the seal of said court, this 2d day of December, 1920.

(Seal of Court)

JOHN R. HAZEL,
U. S. District Judge.

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No. 26, ORIGINAL.

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE
STATE OF NEW YORK FOR A WRIT OF PRO-
HIBITION OR MANDAMUS AGAINST THE
HON. JOHN R. HAZEL, JUDGE OF THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW
YORK, IN A PROCEEDING IN A CASE OF AD-
MIRALTY AND MARITIME JURISDICTION
PENDING IN SAID COURT, ENTITLED:

MARTIN J. MCGAHAN AND MARGARET MC-
GAHAN, AS ADMINISTRATORS OF THE
GOODS, CHATTELS AND CREDITS OF EVELYN
MCGAHAN, DECEASED,

Libellants,

vs.

QUEEN CITY,

Defendant.

**Memorandum in opposition in behalf of
respondents Hon. John R. Hazel, Judge of
the District Court for the Western District
of New York, and the officers of said court.**

Their objections to issuance of the writs are:

FIRST.

This application does not involve a question of jurisdiction, and, even if it does, the case is not one for interference by prohibition or mandamus.

The suit sought to be prohibited is in admiralty in the United States District Court for the Western District of New York. The sole parties at present are the libellants, Martin J. McGahan and Margaret McGahan, as Administrators, etc., and the defendant, the vessel, Queen City. The State is not as yet a party. As yet, also, the libel is purely in rem against the vessel. The owner is not sought to be named or identified, nor is any liability in personam alleged. It is alleged that the vessel while in maritime waters in said western district of New York committed a marine tort resulting in damages to libellants. That the vessel at the time of the commission of the tort and at the time of its seizure was within the jurisdiction of said District Court. All the jurisdictional facts necessary on the face of the libel are set forth in it.

The State has not appeared in the suit or made claim of ownership of the vessel or excepted or answered to the libel. After the suit was begun and the vessel seized it appeared ex parte, specially, and made suggestions of lack of jurisdiction on the ground that it owns the boat and that by reason of its sovereignty said District Court had no jurisdiction of the vessel. Said suggestions being overruled by the District Court, the order herein to show cause was issued by this Court on the ex parte application of said State.

The federal judicial power extends to all cases of admiralty and maritime jurisdiction and is exclusive. Art. 3, Sec. 2, Constitution; Sec. 24, sub 3, and Sec. 256, Judicial Code.)

The Moses Taylor, 4 Wall., 411.

The Hine v. Trevor, 4 Wall., 555.

American Steamboat Co. v. Chase, 16 Wall., 522, 529.

There can be no question but that originally the District Court had jurisdiction. That is under the facts set forth in the libel. It is not claimed otherwise, but only that something has been since extraneously suggested which ousts such jurisdiction—the ownership of the vessel, the *res* by the State. It is, therefore, not a question of jurisdiction, but whether, in such a situation, the powers of a court, originally having jurisdiction, and the jurisdiction itself, are destroyed, or still exist and should be continued over the subject matter to judgment.

The objections to such continuance now interposed by the State, we say, should properly be interposed according to the requirements of proceedings and practice in admiralty courts, that is, by appearing and claiming ownership of the vessel and excepting or answering to the libel, setting forth the grounds, viz.: that said vessel belongs to the State; that it was in the care and charge of the canal officers of the State, which canals are maintained and used by the State for commercial purposes, and which vessel is used by said officers of the State in the care and maintenance of said canals. Then a plea based on the sovereign attributes of the State could be heard, and, if overruled, appeal could be taken as a matter of right to the Circuit Court of Appeals and from there to this court. (*The Steamship Jefferson*, 215 U. S., 130; *The Ira M. Hedges*, 218 U. S., 264.)

In *Illinois Central R. R. Co. v. Adams*, 180 U. S., 28 (21 Sup. Ct. Rep., 251), it was claimed by a state that the proceeding was against it, although it was not named as a party, and could not be maintained against it because of its sovereignty, and this court held that such claim went to the merits and should be raised by demurrer or other pleading in the regular process of the case. (*See State of South Carolina v. Wesley*, 155 U. S., 542, 15 Sup. Ct. Rep., 230.)

This suit in its present form is purely in rem. A question may arise whether such a suit, when not in *personam*, can be maintained under the New York Death Statutes (Secs. 1902, 1903, 1904, 1905 New York Code Civil Procedure). This, however, is not a ground for prohibition (*Ex parte Gordon*, 104 U. S., 515) nor is any such ground urged here.

If, however, the owner of the vessel or any claimant shall appear and proceed by claim, and exception or answer, according to the usual practice in admiralty, libellants will be formally advised as to who the person, or corporation, or State is that may be liable in personam. Having become so informed libellants may procure the libel to be amended, making such person, corporation, or State, as well as the vessel a party, and will then have the advantage of a suit in personam as well as in rem to meet any objection to the suit raised by exception or defense, and have a chance to litigate it. For instance the master or captain sailing the vessel at the time or the superintendent of the canals having charge of the vessel and who authorized its use at the time, might either or both be personally liable. The State itself, if it owns the boat and was operating it as a master of servants in immediate charge of it, might be claimed to be privy to the negligence or wrong and liable in personam, at least in a suit in admiralty.

Section 47 of the Canal Law of the State of New York reads as follows:

"There shall be allowed and paid to every person sustaining damages from the canals or from their use or management or resulting or arising from the neglect or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals, the amount of such damages," etc.

Section 264 of the Code of Civil Procedure of said State provides generally for the liability in damages for a wrongful act, neglect, or default on the part of the State.

In short the question might arise as to whether the State has waived its immunity from liability to libellants, if that be necessary to recovery.

Another phase might arise. The State owns and operates the canals for commercial purposes. It has waived its immunity from liability for damages caused in such operation, to a large extent at least, by Section 47 of the State Canal Law. Has the State waived its immunity from liability to

libellants for the damages they have suffered as alleged? Is the State while operating a vessel on its canals for commercial purposes for pay, through officers and employees, engaged thereby in such governmental functions as will prevent a court of admiralty from exercising powers exclusively lodged in it?

All these questions may become important as under the Workman case (179 U. S., 552 (39 Sup. Ct. Rep., 460)), where they were litigated in the regular and proper way on the merits and not by writ of prohibition.

All such questions, including the question of the jurisdiction of the court as challenged here can be properly examined and litigated only in the regular way according to the procedure and practice in admiralty, and the rulings of the court, reviewed if wanted, upon appeal and error. They cannot be properly examined and adjudicated upon in such an application as this.

It is well established that the writ of prohibition lies only where the District Court clearly had no jurisdiction of the case originally and where the relator has no other remedy.

In re Rice, 155 U. S., 396 (15 Sup. Ct., 149).

In re New York & Porto Rico Co., 155 U. S., 523 (15 Sup. Ct., 183).

It lies only to prevent an unlawful assumption of jurisdiction and not to correct mere errors and cannot be made to perform the office of a proceeding for the correction of such errors.

Ex parte Cooper, 143 U. S., 472 (12 Sup. Ct. Rep., 453, 457).

In re Detroit River Ferry Co., 104 U. S., 519.

It does not lie to perform the functions of a writ of error.

Commissioners of Patents v. Whiteley, 4 Wall., 522.

An error in judgment of an admiralty court cannot be corrected by prohibition but only by appeal.

Ex parte State of Pennsylvania, 109 U. S., 174 (3 Sup. Ct. Rep., 84).

Ex parte Gordon, 104 U. S., 515.

Ex parte Hager, 104 U. S., 520.

Re Fassett, 142 U. S., 479.

Re Engles, 146 U. S., 357.

Re Morrison, 147 U. S., 14.

It will not lie where the case is one in which the decision of the District Court as to a question of jurisdiction could be taken by appeal to the Circuit Court of Appeals and from there to the Supreme Court.

In re Huguley Mfg. Co., 184 U. S., 297 (22 Sup. Ct. Rep., 455).

Alexander v. Crollott, 199 U. S., 580 (26 Sup. Ct. Rep., 161).

Denial of the writ will not prejudice the State in so far as the above remedies are concerned.

Consolidated Rubber Tire Co. v. Ferguson, 183 Fed., 756.

It is obvious, we think, that the matters now urged as grounds for prohibition are matters of defense to the libel, and, also, relate only to questions as to the exercise of the powers of a court of admiralty, and any errors committed by the District Court in these behalfs, including the question of jurisdiction itself, may be corrected by appeal which lies as a matter of right in all cases in admiralty.

Where a District Court has jurisdiction the writ does not lie to restrain it from proceeding to exercise such jurisdiction (*Morrison v. District Court for Southern District of New*

York, 147 U. S., 14 (13 Sup. Ct. Rep., 246), but will issue only in case of want of jurisdiction either of the parties or the subject matter of the proceeding and cannot be used as a substitute for exception to a libel for insufficiency (*ex parte Fassett*, 142 U. S., 479 (12 Sup. Ct. Rep., 295)).

It will not issue to restrain the court from proceeding in a libel case against a vessel for damages for drowning a person in a collision (*in re Gordon*, 104 U. S., 515; *in re Detroit River Ferry Co.*, 104 U. S., 519).

It cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction (*Smith v. Whitney*, 116 U. S., 167), and will be issued only on the record in the suit (*ex parte Easton*, 95 U. S., 68). The record of the suit shows jurisdiction perfect.

We say, therefore, that this is not a case for prohibition, but the grounds urged for the prohibition should be disposed of when raised in the regular and usual manner on the merits of the case (*Scully v. Bird*, 209 U. S., 481 (28 Sup. Ct. Rep., 597)).

SECOND.

The objections here presented by the state founded on its sovereign attributes cannot, on the merits, or otherwise, prevail.

The body of admiralty law and the federal judicial power in admiralty and maritime jurisdiction are paramount and exclusive over and against everything except the sovereignty of the Federal Government itself, and foreign sovereignties having treaty rights. They recognize but one sovereignty in the United States, that of the Federal Government. Nor can there be but one sovereign power over the same thing at the same time. As to this body of law and these judicial powers, the States have surrendered both their sovereign powers and sovereign privileges under the constitution. The State can have or enact no law contravening or affecting them. Nor can

it urge its sovereign attributes to accomplish the same results. To hold otherwise would be a contradiction.

Workmen v. Mayor, 179 U. S., 552 (21 Sup. Ct. Rep., 212, and cases there cited).

U. S. v. Lake Monroe, 250 U. S., 246 (39 Sup. Ct. Rep., 460).

Kuicherbocher Ice Co. v. Stewart, 40 Sup. Ct. Rep., 438).

Southern Pacific Co. v. Jensen, 244 U. S., 205 (37 Sup. Ct. Rep., 525).

Union Fish Co. v. Erickson, 248 U. S., 308.

It is immaterial to whom the vessel proceeded against in admiralty belongs.

Clark v. New Jersey Steam Navigation Co. (C. C. 1841), Fed. Cas. No. 2859.

The John G. Stevens, 170 U. S., 113 (18 Sup. Ct. Rep., 544).

The Siren, 7 Wall., 152.

The question as to the limits of maritime law and admiralty jurisdiction is exclusively a judicial question.

The Lottarvonna (*Rodd v. Heartt*), 21 Wall., 558.

Ex parte Easton, 95 U. S., 68.

The jurisdiction depends not on the character of the parties but on the subject matter.

The Jerusalem (C. C. 1814), Fed. Cas. No. 7293.

De Lovic v. Bait (C. C. 1915), Fed. Cas. No. 3776.

Clark v. New Jersey Steam Navigation Co., Fed. Cas. No. 2859.

The use of the words "admiralty" and "maritime" in the constitution relates simply to subject matter and embraces all

cases arising under the general maritime law (*Waring v. Clark*, 46 U. S. (5 How.), 441, 473).

The States having under the constitution surrendered to the Federal Government their sovereign powers and privileges as to admiralty law and admiralty and maritime jurisdiction, which latter rests exclusively in the federal judicial power, cannot abrogate or limit admiralty law, or defeat or interfere with the exercise and enforcement of such federal judicial power by any law of their own, or by any objection and defense founded on or arising from their sovereignty.

The vessel in question being, and having committed the marine tort, in maritime waters was under the exclusive sovereignty of the United States and within the exclusive Federal judicial power. The State cannot, by reason of its sovereignty as to other matters and things, oust or limit either the Federal sovereignty or the jurisdiction and powers of the Federal courts over the res, the vessel.

IRVING W. COLE,
THOMAS P. HALEY,
Proctors for Hon. John R. Hazel,
Judge U. S. District Court for
Western District of New York.

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EX PARTE IN THE MATTER OF THE STATE
OF NEW YORK ET AL., PETITIONERS.

ON PETITION FOR WRIT OF PROHIBITION AND/OR WRIT OF
MANDAMUS.

No. 25, Original. Argued December 12, 14, 1920.—Decided June 1, 1921.

1. The power to issue a writ of prohibition to prevent a District Court from exceeding its jurisdiction in admiralty is conferred upon this court by Jud. Code, § 234, and may be exercised in a clear case even where an ultimate remedy exists by appeal. Pp. 496, 503.
2. Under the Eleventh Amendment, an admiralty suit in *personam* can not be brought against a State, without its consent, by an individual, whether a citizen of the State or not. P. 497.
3. Whether a suit in admiralty is a suit against a State is determined, not by the names of the titular parties, but by the essential nature and effect of the proceeding as it appears from the entire record. P. 500.
4. In suits in *rem* against privately owned steam tugs for injuries inflicted on libelants' barges, the tug-owners, appearing as claimants, sought to implead the Superintendent of Public Works of the State of New York, alleging that the damages complained of were occasioned while the tugs were under charter to him officially and under his operation, control and management, pursuant to the state law, and praying that as such official he be cited into the suits to answer for the damages and, if not found, that the goods and chattels of the State used and controlled by him be attached. Monitions, issued accordingly, were served on him in the district. *Held*, that these proceedings against the Superintendent were in *personam*, and, considering his functions under the state laws and the ultimate

incidence of the relief sought, were essentially proceedings against the State, beyond the jurisdiction of the District Court in admiralty. P. 501. *Workman v. New York City*, 179 U. S. 552, distinguished. Rule absolute for a writ of prohibition.

PROHIBITION, to restrain proceedings in admiralty in the District Court. The case is stated in the opinion, *post*, 494.

Mr. Edward G. Griffin, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. George A. King*, were on the brief, for petitioners.

Mr. Ellis H. Gidley for respondent:

This court has not granted writs of prohibition when petitioner possessed another remedy. *In re Cooper*, 143 U. S. 472; *Ex parte Gordon*, 104 U. S. 515; *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531.

The District Court, having general jurisdiction over the subject-matter and over the parties, should be allowed to proceed to decision upon the merits, and if error has been or shall be committed in entertaining the claimants' contention against the charterer in the same suit with the libel against the ship, it may be later corrected on appeal. See *In re Fassett*, 142 U. S. 479, 484; *Moran v. Sturges*, 154 U. S. 256, 286; *Ex parte Detroit River Ferry Co.*, 104 U. S. 519; *Ex parte Hagar*, 104 U. S. 520; *In re Rice*, 155 U. S. 396; *In re Huguley Manufacturing Co.*, 184 U. S. 297; *Alexander v. Crollott*, 199 U. S. 580; *Ex parte Oklahoma*, 220 U. S. 191, 208, 209.

The Superintendent of Public Works is subject to the exercise of admiralty jurisdiction. The District Court unquestionably has control of the *res*, as both tugs were within the territorial jurisdiction when arrested. They were subject to maritime liens in favor of the libelants. Likewise the Superintendent was within the territorial jurisdiction when its process, issued conformably to Rule 59, was served personally upon him. Moreover, it was

alleged in the petitions filed by claimants that the Superintendent had and maintained various property under his control and direction within the district. Therefore, the only question is, whether, having such control of the subject-matter, vessels and parties by due and proper exercise of its admiralty process, the District Court might also exercise its admiralty jurisdiction against the Superintendent.

The application of the provisions of Rule 59 to these causes does not change their admiralty characteristics and does not deprive the District Court of jurisdiction. The proceedings became pure actions *in rem*, *sui generis*, distinctly maritime in nature, and we submit that the contrary assertion is neither based on fact nor supported by law.

The Attorney General argues that inasmuch as the *res* are not now under charter to, or in the possession of, the State, there is no basis in such a claim *in personam* against the State. It should be sufficient reply to say that such argument neglects not only the creation by disaster of a *jus in re* enforceable in admiralty by process *in rem*, *The John G. Stevens*, 170 U. S. 113, 117, and cases cited; but likewise takes no thought of the liability of the charterer to return the vessel to the owner free from lien. *The Barnstable*, 181 U. S. 464.

These are not, under any consideration, actions at law or in equity falling within the purview of the Eleventh Amendment. Admiralty suits are neither suits at law nor in equity, but are spoken of in contradistinction to both. 3 Story, Constitution, § 1683, original ed. Admiralty actions are *sui generis*, and are not within the term civil suits, thereby meaning suits of a civil nature at common law or in equity. *United States v. Bright*, Fed. Cas. No. 14,647; *Atkins v. Disintegrating Co.*, 18 Wall. 272.

The prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action,

maritime in its nature. *Workman v. New York City*, 179 U. S. 552, 573. Further, a libel *in personam* may be maintained for any cause within the jurisdiction of an admiralty court, wherever a monition can be served upon the libelee or an attachment made of any personal property or credits of his. *In re Louisville Underwriters*, 134 U. S. 488, 490. *Governor of Georgia v. Madrazo*, 1 Pet. 110, and *Ex parte Madrazo*, 7 Pet. 627, distinguished.

The doctrine laid down by this court in the case of *Workman v. New York City*, *supra*, is wholly decisive of the issue here, for no distinction in the applicability of the rule there laid down was made between corporations, municipal or sovereign; the National Government alone was excepted therefrom.

These are not suits against the State; and, in any event, the question whether they are belongs to the merits rather than to the jurisdiction. *Scully v. Bird*, 209 U. S. 481; *Illinois Central R. R. Co. v. Adams*, 180 U. S. 28.

The cases in which immunity from process has been heretofore claimed and granted on the ground of sovereignty have no application. They were either—(1) actions brought directly against vessels owned or maintained as the property of a sovereign power and at the time of action possessed by it or maintained under its control, or (2) against vessels in the possession of the National Government or vessels of a friendly foreign sovereign. The principle of immunity to vessels in the possession of the National Government was first declared in *The Siren*, 7 Wall. 152, and again in *The Davis*, 10 Wall. 15. Both of those cases nevertheless held that the liens in question were capable of enforcement therein because the possession of the Government was not disturbed in so doing. See *Workman v. New York City*, 179 U. S. 552, 573.

The granting of immunity from process to vessels of a friendly foreign sovereign power apparently has its basis in the decision of *The Exchange*, 7 Cranch, 116, in which it was

held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of the admiralty court, such privilege being based upon international courtesy. See *The Maipo*, 252 Fed. Rep. 627; *The Roseric*, 254 Fed. Rep. 154; *The Pampa*, 245 Fed. Rep. 137.

Nowhere is it suggested that the courtesy accorded vessels of the National Government or of a friendly foreign power can be extended to include one of the several States of the United States. If it should be thought that such doctrine should be so extended, it would still be inapplicable here, where no possession of the *res* by the State or by a state officer could be disturbed by these proceedings *in rem*; and the vessels were not, at the time of seizure, owned, maintained or possessed by the State. Moreover, a further decisive objection lies in the absence of complete sovereignty in the State of New York. Sovereignty in its essence means supreme political authority.

The State of New York may not impose its local law upon the admiralty jurisdiction. *Workman v. New York City*, 179 U. S. 552, 557; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215, 216; *The Lottawanna*, 21 Wall. 558. See also *Union Fish Co. v. Erickson*, 248 U. S. 308.

As between the owners and the charterer, liability for damage caused by negligence of the officers and crew under the dominion of the charterer rests with the charterer.

The State must be presumed to have contemplated the system of maritime law under which the charters were made.

Justice commends the unlimited application of the provisions of Admiralty Rule 59.

MR. JUSTICE PITNEY delivered the opinion of the court.

Three separate libels *in rem* were filed in the United States District Court for the Western District of New

York: two against the Steam Tug *Charlotte*, her engines, boilers, machinery, etc., by one Dolloff and one Wagner respectively, both residents and presumably citizens of the State of New York, to severally recover for damages alleged to have been caused to certain canal boats owned by them while navigated upon the Erie Canal in tow of the *Charlotte*; the other against the Steam Tug *Henry Koerber, Jr.*, her boilers, engines, tackle, etc., by Murray Transportation Company, a corporation of the State of New York, bailee of a certain coal barge, to recover damages alleged to have been received by the barge while navigated upon the Erie Canal in tow of the *Koerber*. In each case the tug was claimed by Frank F. Fix and Charles Fix, partners in business under the name of Fix Brothers, of Buffalo, New York, and released from arrest on the filing of satisfactory stipulations. Claimants filed answers to the several libels, and at the same time filed petitions under Admiralty Rule 59 (new Rule 56), setting up in each case that at the time of the respective disasters and damage complained of the tugs were under charter by claimants to Edward S. Walsh, Superintendent of Public Works of the State of New York, who had entered into such charter parties under authority reposed in him by an act of the Legislature of the State of New York, being c. 264 of the Laws of 1919, and had the tugs under his operation, control, and management; that if decrees should be ordered in the respective causes against the tugs the claimants, because of their ownership of the vessels, would be called upon for payment, and thus would be mulcted in damages for the disasters, to which they were total strangers; and that by reason of these facts Edward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in the same suits for such damages in accordance with the rule. The District Court, pursuant to the prayer of these petitions, caused monitions to be issued in all

three cases against Edward S. Walsh, Superintendent of Public Works, citing him to appear and answer, and, in case he could not be found, that "the goods and chattels of the State of New York used and controlled by him" should be attached. The monitions were served upon Walsh within the jurisdiction of the court.

The Attorney General of the State appeared in all three cases specially in behalf of the State and the People thereof, and of Walsh, and filed a suggestion that the court was without jurisdiction to proceed against Walsh as Superintendent of Public Works for the reason that, as appeared upon the face of the proceedings, they were suits against the State of New York in which the State had not consented to be sued. The District Court denied motions to dismiss the monitions (*The Henry Koerber, Jr.*, 268 Fed. Rep. 561), whereupon the Attorney General, on behalf of the State and the People thereof, and of Walsh as Superintendent and individually, under leave granted, filed in this court a petition for writs of prohibition and mandamus. An order to show cause was issued, to which the District Judge made a return, and upon this and the proceedings in the District Court the matter has been argued.

The record shows that the charters had expired according to their terms, and the tugs were in possession of the claimants, neither the State nor Walsh having any claim upon or interest in them. At no time has any *res* belonging to the State or to Walsh, or in which they claim any interest, been attached or brought under the jurisdiction of the District Court. Nor is any relief asked against Mr. Walsh individually; the proceedings against him being strictly in his capacity as a public officer.

The power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by § 234, Judicial Code (Act of March 3, 1911, c. 231, 36

Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *In re Cooper*, 143 U. S. 472, 495.

That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification. *Beers v. Arkansas*, 20 How. 527, 529; *Railroad Co. v. Tennessee*, 101 U. S. 337, 339; *Hans v. Louisiana*, 134 U. S. 1, 10-17; *North Carolina v. Temple*, 134 U. S. 22, 30; *Fitts v. McGhee*, 172 U. S. 516, 524; *Palmer v. Ohio*, 248 U. S. 32, 34; *Duhne v. New Jersey*, 251 U. S. 311, 313.

Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule. It is true the Amendment speaks only of suits in law or equity; but this is because, as was pointed out in *Hans v. Louisiana*, *supra*, the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia*, 2 Dall. 419, which happened to be a suit at law brought against the State by a citizen of another State, the decision turning upon the construction of that clause of § 2 of Art. III of the Constitution establishing the judicial power in cases in law and equity between a State

and citizens of another State; from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case. In *Hans v. Louisiana*, *supra* (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own State in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.

Among the authorities to which we are referred is Mr. Justice Story, who, in his commentaries on the Constitution (1st ed., § 1683; 5th ed., § 1689), stated that it had been doubted whether the Amendment extended to cases of admiralty and maritime jurisdiction where the proceeding was *in rem* and not *in personam*; and whose doubt was supported by a declaration proceeding from Mr. Justice Washington at the circuit, *United States v. Bright* (1809), *Brightly*, N. P. 19, 25, Note; 24 Fed. Cas. 1232, 1236, No. 14,647; 3 Hall's L. J. 197, 225. But the doubt was based upon considerations that were set aside in the reasoning adopted by this court in *Hans v. Louisiana*. In *Governor of Georgia v. Madrazo*, 1 Pet. 110, 124, the question whether the Eleventh Amendment extended to proceedings in admiralty was alluded to, but found unnecessary to be decided, because, if it did not, the case was for the original jurisdiction of this court and not of the district court in which it was brought; and it was held, further, that the decree could not be sustained as a proceeding *in rem*, because the thing was not in possession of the district court. Subsequently, in *Ex parte Madrazo*, 7 Pet. 627, 632, an application was made to this court to entertain a suit in admiralty against the State of Georgia, and it was held that as there was no property in the custody of the court of admiralty, or brought within its jurisdiction and in the possession of any private person,

the case was not one for the exercise of the admiralty jurisdiction; and that, being a mere personal suit against a State to recover proceeds in its possession, it could not be entertained, since "no private person has a right to commence an original suit in this court against a State." *Atkins v. Disintegrating Co.*, 18 Wall. 272, 300, *et seq.*, and *In re Louisville Underwriters*, 134 U. S. 488, are aside from the point, since they relate merely to a question of statutory construction: whether the provision of § 11 of the Judiciary Act of 1789 (1 Stat. 79, c. 20; reenacted in § 730 of the Revised Statutes, and in § 1 of Act of March 3, 1875, c. 137, 18 Stat. 470), to the effect that no civil suit should be brought against a person by original process in any district other than that of which he was an inhabitant or in which he should be found, applied to suits *in personam* in admiralty so as to prevent the court from acquiring jurisdiction over a corporation through attachment of its goods or property in a district other than that of its residence (in the former case), or by service of process upon its appointed agent (in the latter).

Much reliance is placed upon *Workman v. New York City*, 179 U. S. 552. But that dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant; and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case. Thus (p. 566): "The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law," etc. "But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability

for the commission of a maritime tort, upon the theory relied upon."

We repeat, the immunity of a State from suit in *personam* in the admiralty brought by a private person without its consent, is clear.

As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record (*Osborn v. United States Bank*, 9 Wheat. 738, 846, 850, 857) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record. *Louisiana v. Jumel*, 107 U. S. 711, 719, 720, 723, 727-728; *Hagood v. Southern*, 117 U. S. 52, 67, *et seq.*; *In re Ayers*, 123 U. S. 443, 487-492; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, *et seq.*; *Smith v. Reeves*, 178 U. S. 436, 438-440; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 168-170; *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 469.

Thus examined, the decided cases have fallen into two principal classes, mentioned in *Pennoyer v. McConnaughy*, 140 U. S. 1, 10: "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts [citing cases]. The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit . . . is not, within the meaning of the Eleventh Amendment, an action against the State." The first class, in just reason, is not confined to cases where the suit will operate so as to com-

pel the State specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U. S. 436, 439.

As has been shown, the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York. The office is established and its duties prescribed by the constitution of the State; Art. 5, § 3. He is "charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals," with exceptions not material. By c. 264 of the Laws of 1919, effective May 3, the Superintendent is authorized to provide such facilities as in his judgment may be necessary for the towing of boats on the canals of the State, the towing service to be furnished under such rules and regulations as he shall adopt; and for that service he is authorized to impose and collect such fees as in his judgment may seem fair and reasonable; the moneys so collected to be deposited by him in the state treasury. For the carrying into effect of this act the sum of \$200,000 was appropriated. Under these provisions of law Mr. Walsh, as Superintendent of Public Works, chartered the tugs *Henry Koerber, Jr.*, and *Charlotte*, in the name and behalf of the People of the State of New York, for periods beginning May 15 and ending at latest December 15, 1919; and it was under these charters that they were being operated when the disasters occurred upon which the libels are founded and the petitions under Rule 59 are based. The decrees sought would affect Mr. Walsh in his official capacity, and not otherwise. They might be satisfied out of any property of the State of New York in his hands as Superintendent of Public Works, or made a basis for charges upon the treasury of the State under

§ 46 of the Canal Law (Cons. L. 1909, p. 269), which provides that the commissioners of the canal fund may allow claims for moneys paid by the Superintendent of Public Works or other person or officer employed in the care, management, superintendence, and repair of the canals, for a judgment recovered against them or any of them in any action instituted for an act done pursuant to the provisions of the canal law. In either case their effect, whether complete or not, would expend itself upon the People of the State of New York in their public and corporate capacity. Section 47 of the Canal Law provides for an action before the Court of Claims for certain kinds of damages arising from the use or management of the canals; but in terms it is provided that this "shall not extend to claims arising from damages resulting from the navigation of the canals." There is no suggestion that the Superintendent was or is acting under color of an unconstitutional law, or otherwise than in the due course of his duty under the constitution and laws of the State of New York. In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of New York, and therefore—since no consent has been given—beyond the jurisdiction of the courts of the United States.

There is no substance in the contention that this result enables the State of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman v. New York City*, 179 U. S. 552, 557-560; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215; *Union Fish Co. v. Erickson*, 248 U. S. 308, 313; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160. The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law

as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 382, 384. It is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

The want of authority in the District Court to entertain these proceedings *in personam* under Rule 59 (now 56) brought by the claimants against Mr. Walsh as Superintendent of Public Works of the State of New York is so clear, and the fact that the proceedings are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued as prayed. *Ex parte Simons*, 247 U. S. 231, 239; *Ex parte Peterson*, 253 U. S. 300, 305.

Rule absolute for a writ of prohibition.

EX PARTE IN THE MATTER OF THE STATE OF
NEW YORK ET AL., OWNERS OF THE STEAM
TUG QUEEN CITY, PETITIONERS.

ON PETITION FOR WRIT OF PROHIBITION AND/OR WRIT
OF MANDAMUS.

No. 26, Original. Argued December 14, 1920.—Decided June 1, 1921.

1. The facts that a vessel, libeled in the District Court, is the property of a State, in its possession and control and employed in its public governmental service, may be established, *prima facie*, at least, by

Argument for Respondents.

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a suggestion verified and filed by the attorney general of the State, in his official capacity, in connection with his special appearance and objection to the jurisdiction. P. 509. *Ex parte Muir*, 254 U. S. 522, distinguished.

2. Under the admiralty law, a vessel owned and possessed by a State and employed exclusively for its governmental purposes, is exempt from seizure in a suit to recover damages for a death caused by her negligent operation. P. 510.

Rule absolute for writ of prohibition.

PROHIBITION to restrain proceedings in admiralty in the District Court. The case is stated in the opinion, *post*, 508.

Mr. Edward G. Griffin, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. George A. King*, were on the brief, for petitioners.

Mr. Irving W. Cole, with whom *Mr. Thomas P. Haley* was on the brief, for respondents:

There can be no question but that originally the District Court had jurisdiction, under the facts set forth in the libel. It is not claimed otherwise, but only that something has been since extraneously suggested which ousts such jurisdiction—the ownership of the *res* by the State. It is, therefore, not a question of jurisdiction, but whether, in such a situation, the powers of a court, originally having jurisdiction, and the jurisdiction itself, are destroyed, or still exist and should be continued over the subject-matter to judgment.

The objections to such continuance now interposed by the State, we say, should properly be interposed according to the requirements of proceedings and practice in admiralty courts, by appearing and claiming ownership and excepting or answering to the libel, setting forth the grounds. Then a plea based on the sovereign attributes of the State could be heard, and, if overruled, appeal

could be taken as a matter of right to the Circuit Court of Appeals and from there to this court. *The Steamship Jefferson*, 215 U. S. 130; *The Ira M. Hedges*, 218 U. S. 264; *Illinois Central R. R. Co. v. Adams*, 180 U. S. 28; *South Carolina v. Wesley*, 155 U. S. 542.

This suit in its present form is purely *in rem*. A question may arise whether such a suit, when not *in personam*, can be maintained under the New York Death Statutes (§§ 1902, 1903, 1904, 1905, New York Code Civil Procedure). This, however, is not a ground for prohibition, *Ex parte Gordon*, 104 U. S. 515; nor is any such ground urged here.

If, however, the owner of the vessel or any claimant shall appear and proceed by claim, and exception or answer, according to the usual practice in admiralty, libelants will be formally advised as to who the person, or corporation, or State is that may be liable *in personam*. Having become so informed libelants may procure the libel to be amended, making such person, corporation, or State, as well as the vessel, a party, and will then have the advantage of a suit *in personam* as well as *in rem* to meet any objection to the suit raised by exception or defense, and have a chance to litigate it. For instance, the master or captain sailing the vessel at the time or the superintendent of the canals having charge of the vessel and who authorized its use at the time, might either or both be personally liable. The State itself, if it owns the boat and was operating it as a master of servants in immediate charge of it, might be claimed to be privy to the negligence or wrong and liable *in personam*, at least in a suit in admiralty. Canal Law, § 47; Code Civ. Proc., § 264.

The question might arise as to whether the State has waived its immunity from liability to libelants, if that be necessary to recovery. The State owns and operates the canals for commercial purposes. It has waived

its immunity from liability for damages caused in such operation, to a large extent at least, by § 47 of the State Canal Law. Has the State waived its immunity from liability to libelants for the damages they have suffered as alleged? Is the State while operating a vessel on its canals for commercial purposes for pay, through officers and employees, engaged thereby in such governmental functions as will prevent a court of admiralty from exercising powers exclusively lodged in it?

All these questions may become important, as under *Workman v. New York City*, 179 U. S. 552, where they were litigated in the regular and proper way on the merits and not by writ of prohibition.

It is well established that the writ of prohibition lies only where the District Court clearly had no jurisdiction of the case originally and where the relator has no other remedy.

Where a district court has jurisdiction the writ does not lie to restrain it from proceeding to exercise such jurisdiction, *Morrison v. District Court*, 147 U. S. 14; but will issue only in case of want of jurisdiction either of the parties or the subject-matter of the proceeding and cannot be used as a substitute for exception to a libel for insufficiency. *In re Fassett*, 142 U. S. 479. It will not issue to restrain the court from proceeding in a libel case against a vessel for damages for drowning a person in a collision. *Ex parte Gordon*, 104 U. S. 515; *Ex parte Detroit River Ferry Co.*, 104 U. S. 519. It cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction, *Smith v. Whitney*, 116 U. S. 167; and will be issued only on the record in the suit. *Ex parte Easton*, 95 U. S. 68. The record of the suit shows jurisdiction perfect.

We say, therefore, that this is not a case for prohibition, but the grounds urged for the prohibition should be disposed of when raised in the regular and usual manner

on the merits of the case. *Scully v. Bird*, 209 U. S. 481.

The body of admiralty law and the federal judicial power in admiralty and maritime jurisdiction are paramount and exclusive over and against everything except the sovereignty of the Federal Government itself, and foreign sovereignties having treaty rights. They recognize but one sovereignty in the United States, that of the Federal Government. Nor can there be but one sovereign power over the same thing at the same time. As to this body of law and these judicial powers, the States have surrendered both their sovereign powers and sovereign privileges under the Constitution. The State can have or enact no law contravening or affecting them. Nor can it urge its sovereign attributes to accomplish the same results. To hold otherwise would be a contradiction. *Workman v. New York City*, 179 U. S. 552; *The Lake Monroe*, 250 U. S. 246; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Union Fish Co. v. Erickson*, 248 U. S. 308.

It is immaterial to whom the vessel proceeded against in admiralty belongs. *Clark v. New Jersey Steam Navigation Co.*, Fed. Cas. No. 2,859; *The John G. Stevens*, 170 U. S. 113; *The Siren*, 7 Wall. 152.

The question as to the limits of maritime law and admiralty jurisdiction is exclusively a judicial question. *The Lottawanna*, 21 Wall. 558; *Ex parte Easton*, 95 U. S. 68.

The jurisdiction depends not on the character of the parties but on the subject-matter. *The Jerusalem*, Fed. Case. No. 7,293; *De Lovic v. Boit*, Fed. Cas. No. 3,776; *Clark v. New Jersey Steam Navigation Co.*, *supra*.

The use of the words "admiralty" and "maritime" in the Constitution relates simply to subject-matter and embraces all cases arising under the general maritime law. *Waring v. Clarke*, 5 How. 441, 473.

The vessel in question being, and having committed the

marine tort, in maritime waters was under the exclusive sovereignty of the United States and within the exclusive federal judicial power. The State cannot, by reason of its sovereignty as to other matters and things, oust or limit either the federal sovereignty or the jurisdiction and powers of the federal courts over the *res*, the vessel.

MR. JUSTICE PITNEY delivered the opinion of the court.

In October, 1920, Martin J. McGahan and another, as administrators of Evelyn McGahan, deceased, filed a libel in admiralty in the District Court of the United States for the Western District of New York against the Steam Tug *Queen City*, her tackle, apparel, and furniture, to recover damages alleged to have been sustained through the death of deceased by drowning, due to the negligent operation of the *Queen City* upon the Erie Canal, in said district. The Attorney General of the State of New York appeared specially for the purpose of questioning the jurisdiction of the court, and filed a verified suggestion of the want of such jurisdiction over the *Queen City*, for the reason that at all times mentioned in the libel and at present she was the absolute property of the State of New York, in its possession and control, and employed in the public service of the State for governmental uses and purposes, and, at the times mentioned in the libel, was authorized by law to be employed only for the public and governmental uses and purposes of the State of New York, such purposes being the repair and maintenance of the Improved Erie Canal, a public work owned and operated by the State, and particularly the towing of dredges, the carrying of material and workmen, the towing of barges and vessels containing material, and the setting, replacing, and removing of buoys and safety devices. He prayed that the vessel be declared immune from process and free from seizure and attachment, and

that the libel and all proceedings thereunder be dismissed for want of jurisdiction.

The District Court overruled the suggestion and awarded process *in rem*, under which the *Queen City* was arrested. Thereupon the Attorney General, in behalf of the State, filed in this court, under leave granted, a petition for a writ of prohibition to require the District Court to desist from further exercise of jurisdiction and for a mandamus to require the entry of an order declaring the *Queen City* to be immune from arrest. An order to show cause was issued, to which the District Judge made return, embodying by reference the admiralty proceedings; and the matter was argued together with No. 25, Original, *Ex parte New York, No. 1*, just decided, *ante*, 490.

To the suggestion that the *Queen City* is the property of the State of New York, in its possession and control and employed in its public governmental service, it is objected at the outset that the record and proceedings in the suit in admiralty do not disclose the identity of the owner of the vessel or that she was employed in the governmental service of the State. We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge. The suggestion was overruled and denied, with costs, and process thereupon ordered to issue against the vessel, without any intimation that there was doubt about the facts stated in the suggestion, or opportunity given to verify them further. It would be an unwarranted aspersion upon the honor of a great State to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court, as now requiring

verification. *Ex parte Muir*, 254 U. S. 522, differs widely, for there the suggestion that the vessel was exempt because of its ownership and character came not through official channels but from private counsel appearing as *amici curiæ*, who, on being challenged to submit proof in support of the allegations in the suggestion, refused to do so. Of course, there were other and more fundamental differences, but it is the one mentioned that especially concerns us upon the question of practice.

Accepting, as we do, the facts stated in the suggestion of the Attorney General, the record—aside from whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State, barred by the general principle applied in *Ex parte New York, No. 1*, No. 25, Original—presents the question whether the proceeding can be based upon the seizure of property owned by a State and used and employed solely for its governmental uses and purposes.

By the law of nations, a vessel of war owned by a friendly power and employed in its service will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 144-147. In a case before Judge Francis Hopkinson in the admiralty court of Pennsylvania in 1781, on a plea to the jurisdiction, it was adjudged that marines enlisting on board a ship of war or vessel belonging to a sovereign independent state could not libel the ship for their wages. *Moitez v. The South Carolina*, Bee, 422; Fed. Cas. No. 9,697. The question whether by international law the rule of *The Exchange* is to be applied to other kinds of public vessels owned or controlled by friendly powers (see *The Parlement Belge* [1880], L. R. 5 Prob. Div. 197), was stirred in *Ex parte Muir, supra*, but found unnecessary to be decided. It does not now press for solution; for, aside from the obligations of inter-

national law, though upon principles somewhat akin, it is uniformly held in this country that even in the case of municipal corporations, which are not endowed with prerogatives of sovereignty to the same extent as the States by which they are created, yet because they exercise the powers of government for local purposes, their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. As Mr. Chief Justice Waite said, speaking for this court in *Klein v. New Orleans*, 99 U. S. 149, 150, "To permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself." The rule was applied in the admiralty by the same learned Chief Justice, sitting on appeal at the circuit, in *The Fidelity*, 16 Blatchf. 569; Fed. Cas. No. 4,758, upon a well-considered opinion. To the same effect, *The Seneca* (1876), Fed. Cas. No. 12,668; *Long v. The Tampico* (1883), 16 Fed. Rep. 491, 494; *The Protector* (1884), 20 Fed. Rep. 207; *The F. C. Latrobe* (1886), 28 Fed. Rep. 377, 378; *The John McCracken*, 145 Fed. Rep. 705, 706.

The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes.

Upon the facts shown, the *Queen City* is exempt, and the prohibition should be issued.

Rule absolute for a writ of prohibition.